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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PETER I. WALDMANN,

Petitioner.

v.

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORPORATION, and as Receiver,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Attorney for Petitioner
Peter I. Waldmann

158/88

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner PETER I. WALDMANN (Waldmann) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit taxing said petitioner with attorneys' fees and double costs, duly made and entered the 31st day of October, 1986. App. at 1A

QUESTIONS PRESENTED

1. Did the court of appeals abuse its discretion in taxing petitioner with attorneys' fees and double costs?

2. May a court of appeals tax appellate counsel for attorneys' fees and double costs without considering or making any findings of fact, both as to said counsel's conduct and why a lesser sanction would not have been equally effective?

3. May a court of appeals tax appellate counsel for attorneys' fees and double costs on the basis of a motion unsupported by any affidavit or affirmation?

4. May a court of appeals tax appellate counsel for attorneys' fees and double costs, absent a showing of bad faith on the part of said counsel in pursuing an appeal found to be frivolous?

5. May a court of appeals tax all appellate counsel, along with their clients, for attorneys' fees and double costs, jointly and severally, despite their varying degrees of participation?

6. May a court of appeals tax appellate counsel for attorneys' fees and double costs without affording said counsel a reasonable opportunity to contest the merits of such determination and to offer evidence in opposition or mitigation which might justify no penalty

or authorize the imposition of a lesser one?

7. May an attorney who formally enters a case after the filing and service of appellants' main brief and, in essence, does nothing substantive on his clients' behalf other than filing and serving a reply brief and present one-half of oral argument, be subject to the full force of available sanctions?

8. May such conduct, by itself, on the part of appellate counsel be tantamount to a finding of a "frivolous. . . .appeal" under the applicable sanctions?

9. May a court of appeals tax appellate counsel for attorneys' fees and double costs without specifying which rule or statutory sanctions it is applying?

PARTIES TO THE PROCEEDINGS

All the named parties to this proceeding, except PETER I. WALDMANN, are listed in the caption to this petition.

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TABLE OF CASES AND AUTHORITIES

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OPINIONS BELOW

The opinion-judgment of the Court of Appeals for the Eleventh Circuit is unreported and is included in the Appendix hereto at 1A. A petition for rehearing en banc was denied by an order which is included in the Appendix hereto at 2A.

JURISDICTION

The court of appeals decision of which review is sought was issued on October 31, 1986. (App.at 1A). The petition for rehearing and suggestion for rehearing en banc was denied on December 12, 1986. (App. at 2A). Jurisdiction of this Court in invoked pursuant to 28 U.S.C. 1254.

STATUTORY PROVISIONS

The relevant rule and statutory provisions are as follows:

Rule 38, Federal Rules of Appellate Procedure:

> If a court of appeals shall determine that an appeal is frivolous, it may award damages and

single or double costs to the appellee.

28 U.S.C. 1912:

> Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

28 U.S.C. 1927:

> Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multipies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

PRELIMINARY STATEMENT

This petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit is to seek review of that tribunal's judgment taxing appellate counsel PETER I. WALDMANN with attorneys' fees and double costs.

STATEMENT OF THE CASE

On May 15, 1981, Sidney L. Jaffe (Jaffe), Meadow Valley Ranchos Incorporated, Rocky Mountain Construction and Development Corporation, and Atlantic Commercial Development Corporation (the corporate appellants) brought a 42 U.S.C. 1983 civil rights action in the United States District Court for the Middle District of Florida against respondent CHARLES GRANT (Grant), indivdually and as Trustee in Bankruptcy of the Continental Southeast Land Corporation (Continental) of which Jaffe was vice-president. This civil suit, which was filed on the eve of Jaffe's criminal trial in Florida for the failure of Continental to deliver deeds to vendees of lots in that state purchased from it, sought, inter alia, to restrain the said state criminal proceedings. Grant retaliated with, among other things, a counterclaim, seeking to enforce a state

court default judgment against the corporate appellants, as more fully described below, holding them liable to return the sums collected from Continental's vendees, and ordering an accounting thereto.

Thereafter, Grant moved for sanctions in the said civil rights action because of Jaffe's failure to appear at scheduled depositions. The district court granted this motion and awarded attorneys' fees to be paid by Jaffe, as well as an additional award thereof when said fees were not paid as ordered. During this time, the federal plaintiffs were guilty of nonresponsive, evasive and incomplete responses to certain interrogatories propounded by Grant, as well as failures to produce certain documents demanded by him, prompting his motion to strike the answer to his counterclaim. The district court took no action on the latter motion at that time.

Subsequently, and following Jaffe's state conviction and sentencing to 145 years imprisonment on those charges,[1] the district court dismissed the civil rights action as well as Grant's counterclaim, without prejudice, upon Jaffe's agreement to pay defendant's reasonable costs and attorneys' fees. When Jaffe failed to make the required payments, the court reinstated Grant's counterclaim and granted his renewed motions for sanctions. After a hearing, it struck the answers to the counterclaim and entered a default

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[1]When Jaffe did not appear for his criminal trial, he was convicted of failure to appear as well as violations of Florida's Uniform Land Sales Practices Law, but the latter conviction was reversed on appeal. See Jaffe v. Sanders, 438 So. 2d 72 (Fla. 5th Dist. Ct. App. 1983). He was later charged with organized fraud, Jaffe v. Sanders, 463 So. 2d 318 (Fla. 5th Dist. Ct. App. 1985).

judgment against all plaintiffs in the sum of $3,000,000, plus interest, on October 2, 1984.[2]

Plaintiffs duly and timely appealed said judgment to the court below. On July 18, 1986, the latter tribunal affirmed the judgment of the district court, at 793 F.2d 1182 (11th Cir. 1986) (App. at 5A) and entered an appropriate judgment. On August 26, 1986, Grant moved, pursuant to Rule 38 (Fed. R. App. P.), and 28 U.S.C. sections 1912 and 1927, for an order awarding him attorneys' fees, double costs, and damages against all plaintiffs

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[2]The amount of this judgment corresponded to that awarded in a state court proceeding in the Circuit Court of Putnam County, Florida, sub. nom. Barbara Raymond, et al. v. Continental Southeast Land Corp., No. 78416, a civil suit growing out of Continental's failure to deliver deeds to the lot vendees referred to above. See, Ruby Mountain Construction & Development Corp. v. Raymond, 404 So. 2d 525 (Fla. Dist. Ct. App. 1982).

as well as appellate counsel, Prof. Fletcher N. Baldwin, Jr., and petitioner WALDMANN, jointly and severally. On September 4, 1986, WALDMANN requested an extension of time in which to respond to said motion until October 14, 1986, and, at the same time, filed and served a Notice of Withdrawal as counsel for the corporate appellants. Ten days later,said motions were denied below after WALDMANN had served and filed a response to Grant's motion to tax attorneys' fees and related relief on October 14, 1986. App. at 33A.

On October 30, 1986, WALDMANN moved for reconsideration of the aforesaid order of the court below denying his motion to withdraw as counsel and for an extension of time in which to file a full response to Grant's motion for attorneys' fees and related relief. This motion was denied on November 25, 1986. Earlier, and on October 31, 1986, the court below had

granted respondent's motion for attorneys' fees and double costs. (App. at 1A).

On November 20, 1986, WALDMANN filed and served a petition for Reconsideration of the said sanctions order and a Suggestion for Rehearing En Banc with the court below. (App. at 35A). A motion by Grant to strike said motion was denied on January 14, 1987. Earlier, and on December 12, 1986, WALDMANN's Petition for Reconsideration and Suggestion for Rehearing En Banc were denied. (App. at 2A).

On March 6, 1987, WALDMANN's time in which to file a petition for a writ of certiorari herein was extended by order of Associate Justice Powell to and including April 12, 1987. (App. at 73A).

STATEMENT OF FACTS

The appeal below was prosecuted by Jaffe on a pro se basis, following the timely filing of a Notice of Appeal by one James H. Burgess, Jr., a Florida attorney,

on November 1, 1984.[3] Following service and filing of respondent's answering brief, WALDMANN served and filed, on or about December 30, 1985, a reply brief on behalf of the corporate appellants alone, after Jaffe had filed and served his own reply brief.

WALDMANN, who was admitted to practice in Canada on April 7, 1983, and in New York on June 25, 1985, had moved for admission to the court below on July 4, 1985.[4] At the same time, said petitioner filed a motion on behalf of the corporate appellants, in response to Grant's motion to strike their appeals, to adopt Jaffe's brief. On July 23, 1985, the court below denied respondent's motion to dismiss the

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[3]Mr. Burgess withdrew as counsel by the filing of a Notice of Withdrawal on May 30, 1985.

[4]This motion was eventually granted on July 11, 1985.

appeal and granted the corporate appellants' motion to adopt Jaffe's brief.

With the exception of an unsuccessful pre-argument motion to supplement the record, a response to respondent's equally unsuccessful motion to strike the corporate appellant's reply brief, oral argument on January 29, 1986, which he shared with Prof. Baldwin[5], and a letter to the court on February 6, 1986, "to clarify" the corporate appellants' "submission" on the imposition of sanctions by the district court, WALDMANN did nothing further on behalf of his clients. His withdrawal motion on September 4, 1986, was grounded on the fact that his bills had not been paid and he had been

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[5]WALDMANN's role was to recite a factual history of the case.

discharged by his clients and directed to proceed no further. (App. at 74A).

REASONS FOR GRANTING THE WRIT

This petition provides a significant opportunity for this Court to establish appropriate and uniform standards and criteria for the imposition of sanctions upon counsel in connection with so-called "frivolous" appeals. What the court below has done, namely to tax attorneys' fees and double costs to all appellants and their counsel of record at the time of such imposition, on an indiscriminate basis and without any findings of fact [6] or differentiation based on degree and

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[6] "To ensure . . . that fear of an award of attorneys' fees . . . will not deter persons with colorable claims from pursuing (them), we have declined to uphold awards underthe bad faith exception absent both 'clear evidence' that the

(Footnote Continued)

nature of participation, insofar as the lawyers are concerned, is both clearly inequitable and devoid of any guidance for the future. The intervention of this Court is indispensible at this time as rising caseloads in the various circuits, see, e.g., Rubin, Bureaucratization of the Federal Courts, the Tension Between Justice and Efficiency, 55 Notre Dame Law 648 (1980), may well lead federal appellate tribunals to resort to sanctions more readily. Already such diverse interpretations as Hagerty v. Succession of Clement, 749 F.2d 217 (5th Cir. 1984); Malhiot v. Southern Cal. Retail Clerks

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(Footnote Continued)
challenged actions 'are entirely without color and are undertaken for reasons of harassment or delay or for other improper purposes' and 'a high degree of specificity in the factual findings.'" Dow Chemical Pacific, Ltd. v. Rascator Maritime, S.A., 782 F. 2d 329, 344 (2nd Cir. 1986).

Union, 735 F.2d 1133 (9th Cir. 1984 (Boochever, J., dissenting), and Kiefel v. Las Vegas Hacienda, Inc., 404 F.2d 1163 (7th Cir., 1968), cert. den., 395 U.S. 908 (1969), will continue to plague courts and counsel alike.

In Hagerty, the Fifth Circuit, relying on a 1980 amendment of Section 1927, Title 28 U.S.C., which added "expenses and attorneys' fees" to "excess costs" as possible sanctions against any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously," imposed liability upon a lawyer because the appeal (was) certainly frivolous, and has unreasonably and vexatiously multiplied the proceedings in a case that has been in the courts for more thn six years." 749 F.2d at 223.

The circuit did not observe any of the requisite due process protections, despite the fact that the House-Senate Conference Report had stated that "the managers intend that judges applying Section 1927 will safeguard the rights of an attorney who may be held in violation of the section. Before sanctioning an attorney under Section 1927, the court is to afford the attorney all appropriate protections available under law." H. Conf. Rep. No. 96-1234, 98th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. and Ad. News 2781. This insistence was amplified on the House floor during the debates on the offered amendment. See, e.g., remarks of Rep. Mazzoli that "it is imperative that the court afford the attorney all appropriate protections of due process available under law." 126 Cong. Rec. 23625 (1980). See also, Miles v. Dickson, 387 F.2d 716 (5th Cir. 1967) (per curiam) (assessment of

costs "without notice and hearing (is). . . wrong."); United States v. Nesglo, Inc., 744 F.2d 887, 890 (1st Cir. 1984) (hearing required unless court has no reason to believe that motion for sanctions is opposed); United States v. Blodgett, 709 F.2d 608, 610 (9th Cir. 1983 (reversing district court sanctions under section 1927 with the conclusion that "a hearing was required to determine if the appeal was taken solely for the purpose of delay."); McCandless v. Great Atlantic & Pac. Tea Co., Inc.,697 F.2d 198,201 (7th Cir. 1983) (sanctions imposed after opportunity for explanation given); McConnell v. Critchlow, 661 F.2d 116, 119 (7th Cir. 1981) (counsel offered opportunity "to state any reason why sanctions should not be imposed against him" during oral argument). Cf. Limerick v. Greenwald, 749 F.2d 97 (1st Cir. 1984) (section 1927

sanctions imposed after numerous warnings in published and unpublished opinions.)

Circuit Judge Boochever's dissenting opinion in Malhiot, provides a thoughtful analysis of the proper procedural response to 1927. Beginning with the premise that the statute is penal in nature and that attorney liability "requires bad faith and intentional misconduct," 735 F.2d at 1138, he recommends that counsel be given notice during argument with ample opportunity to respond. With reference to cases on the summary calendar, he would require the issuance of "an order to show cause why a penalty should not be imposed." Id., at 1139. While the instant case was not on the summary calendar, an indication that it was not considered "frivolous," it is obvious, from respondent's motion for sanctions, that WALDMANN was penalized for

the sins of his predecessors or Jaffe. App. at 77A. [7]

In Kiefel, the Seventh Circuit held that the statute could only be invoked "in App. at 52A. instances of a serious and studied disregard of the orderly processes of justice." 404 F.2d at 1167. [8] Other Seventh Circuit decisions emphasize the subjective nature of the "bad faith" test. In this connection, see, McCandless v. Great Atlantic & Pac. Tea Co., 697 F.2d

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[7] The potential dollar amount of the penalty faced by WALDMANN can be estimated by the demand letter just received by Prof. Baldwin from respondent's counsel asking for the sums of $23,760 for attorneys fees and expenses and $10,000 in damages, with a threat to double those amounts if they were not promptly paid.

[8] It must always be kept in mind that the socalled "American Rule" holds that "the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247 (1975).

198, 202 (7th Cir. 1983); Badillo v. Central Steel & Wire Co., 717 F.2d 1160,1166 (7th Cir. 1983); and Knorr Brake Corp. v. Harbil, Inc., 738 F.2d 223, 227 (7th Cir. 1984).[9] See, Limerick v. Greenwald, 749 F.2d 97 (1st Cir. 1984), sanctions were imposed, after numerous warnings by the court, because "Where, as here. . . the counsel for appellant has not simply filed a frivolous and vexatious appeal but is before the court for the fourth time raising fundamentally the same issues, the need to impose sanctions is obvious."

As the Second Circuit recently observed in Oliveri v. Thompson, 803 F.2d 1265, 1271 (2d Cir. 1986), "Unfortunately

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[9] Cf. Kamen v. American Telephone & Telegraph Co., 791 F.2d 1006, 1010 (2d Cir. 1986), in which the Second Circuit required "a clear showing of bad faith" for the imposition of 1927 sanctions.

. . . we do not yet have an integrated 'code'of sanctions to supply coherent guidance. Indeed, the sources of judges' sanctioning power are diverse, and the standards invoked have not always been either clear or consistently applied." As previously stated, the granting of the within petition will not only enable this court to resolve the different approaches of the various circuits, as indicated above, but provide "an integrated 'code' of sanctions to supply coherent guidance" in this difficult and delicate area for the future.

The court of appeals, in incredibly summary fashion, granted respondent's motion for double costs and attorneys' fees. It neither specified which of the three authorities relied upon by respondent, namely, Rule 38, and Sections 1912 and 1927, were being applied nor did it issue any findings of fact or conclusions

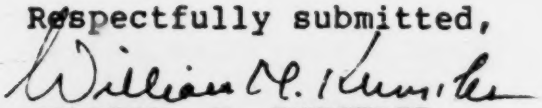
of law. Lastly, it held no due process hearing of any kind and did not grant WALDMANN sufficient time in which to respond to Grant's sanctions motion. Under all of the criteria established by this Court relating to the granting of petitions for writs of certiorari, the within application certainly qualifies.

CONCLUSION

For all of the reasons set forth above, it is respectfully prayed that this Court grant the within petition and issue its writ of certiorari to the United States Court of Appeals for the Eleventh Circuit.

Dated : New York, N.Y.
April 5, 1987

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 84-3747

SIDNEY JAFFE, individually, MEADOW VALLEY RANCHOS, INC., etc., et al.,

Plaintiff-Counter-Claim
Defendants-Appellants,

versus

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORP., and as Receiver,

Defendant-Counter-Claim
Plaintiff-Appellee.

Appeal From the United States District Court for the Middle District of Florida

Before FAY, CLARK and NIES,* Cir. Judges.

Appellee's motion to tax attorney's fees and double costs against appellants and their counsel is granted. The case is remanded to the district court for determination of the reasonable amount of attorney's fees.

10-30-86 Helen W. Nies
Date United States District Judge

*Hon. Helen W. Nies, U.S. Circuit Judge, for the Federal Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3747

SIDNEY JAFFE, individually, MEADOW VALLEY RANCHOS, INC., etc., et al,

Plaintiffs-Counter-Claim
Defendants-Appellants,

versus

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORP., and as Receiver,

Defendant-Counter-Claim
Plaintiff-Appellee.

Appeal From The United States District Court For the Middle District of Florida

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Before: FAY, CLARK, and NIES* CIRCUIT JUDGES

PER CURIAM:

(XX) The Petition for Reconsideration of the order awarding attorney's fees and double costs against appellants and their counsel is DENIED and no member of this

*Hon. Helen W. Nies, U.S. Circuit Judge, for the Federal Circuit, sitting by designation.

panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35), Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Reconsideration of the order awarding attorneys' fees and double costs against appellants and their counsel is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of the order awarding

attorney's fees and double costs against appellants and their counsel, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/S/ PETER T. FAY
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3747

SIDNEY JAFFE, individually, MEADOW VALLEY RANCHOS, INC., etc., et al,

Plaintiffs-Counter-Claim
Defendants-Appellants,

versus

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORP., and as Receiver,

Defendant-Counter-Claim
Plaintiff-Appellee.

Appeal From The United States District Court For the Middle District of Florida

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Before: FAY, CLARK, and NIES* CIRCUIT JUDGES.

NIES, Circuit Judge

Sidney L. Jaffe, Meadow Valley Ranchos, Inc., Atlantic Commercial Development Corp. and Ruby Mountain Construction and Development Corp. appeal

*Honorable Helen W. Nies, U.S. Circuit Judge for the Federal Circuit, sitting by designation.

the judgement of the United States District Court for the Middle District of Florida (Jacksonville, Division, John H. Moore, Jr.) awarding Charles Grant, trustee in bankruptcy for Continental Southeast Land Corp., the sum of $3 million plus interest. Trustee Grant had received a state court judgment of that amount which is the basis for the district court's judgement here. Jaffe et al assert a number of errors by the district court in giving full faith and credit and the effect of res judicata to the state court judgment. We affirm.

Background

The genesis of this action occurred in 1972 when Continental Southeast Land Corporation bought a large tract of Florida land, subdivided it into more than 2800 lots, and began selling the lots to individuals on installment contracts payable to Continental. At the

same time Continental was borrowing from individual investors. Sidney Jaffe was vice-president of Continental. Through a series of transactions in 1976 and 1977, Continental's interests in the remaining land and the vendee accounts were transferred to Meadow Valley Ranchos, Inc., Ruby Mountain Construction & Development Corp. (collectively, the corporations). Sidney Jaffe was president of each corporation. Shortly thereafter Continental defaulted on payments to its investors. The investors responded by filing suit in the Circuit Court of Putnam County, Florida, against Continental and the corporations to set aside the transfers of land and the vendee contracts as fraudulent and to appoint a receiver for Continental. Barbara Raymond et al. v. Continental Southeast Land Corp., No. 78-416.

In June, 1979, Jaffe caused Continental to file a Chapter XI petition under the Bankruptcy Act. In January, 1980, the bankruptcy court adjudicated Continental bankrupt and appointed Charles Grant, the appellee herein, as trustee. After the bankruptcy court lifted the statutory automatic stay, the state court in the Raymond case substituted the trustee Grant for Continental and realigned him as a plaintiff. In March, 1981, the state court entered a final default judgment setting aside the transfers, holding the corporations liable to return the sums collected from the contract vendees and ordering an accounting. The corporations appealed the state court's March, 1981 order. In the interim, they refused to make the accounting and were held in contempt by the trial court. Because of their continuing contempt, the appellate

court dismissed the appeal. Atlantic Commerical Development Corp. v. Raymond, No. 81-560 (Fla 5th Dist.Ct. App. Sept. 10, 1981).

Meanwhile, Jaffe had been arrested and charged with failure to deliver deeds to lot purchasers in violation of the Florida Uniform Land Sales Practices Law.[1] On May 15, 1981, the eve of his criminal trial, Jaffe and the corporations filed the subject action in the United States District Court for the

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[1]Jaffe did not appear for trial in the criminal case, see Accredited Surety & Casualty Co. v. State, 418 So.2d 378 (Fla 5th Dist.Ct. App. 1982), and was convicted of failure tc appear as well as the Land Sales Act violations. The land sales convictions were overturned on appeal, but the failure to appear conviction was upheld. Jaffe v. State, 438 So2d 72 (Fla. 5th Dist.Ct.App. 1983). Jaffe's partial victory in the Court of Appeals may prove pyrrhic, however; Jaffe was subsequently charged with organized fraud. See Jaffe v. Sanders, 463 So.2d 318 (Fla. 5th Dist.Ct.App. 1985).

Middle District of Florida charging that trustee Grant and others had conspired to violate their civil rights and seeking to restrain the state criminal case. Trustee Grant responded, inter alia, with a counterclaim seeking enforcement of the Raymond judgment for an accounting against Jaffe individually as well as against the corporations on the ground that the corporations were merely his alter egos.

During the course of these proceedings, trustee Grant moved for sanctions for Jaffe's failure to appear at scheduled depositions. The district court granted the motion and awarded attorney fees. When the attorney fees were not paid as ordered, trustee Grant filed a renewed motion for sanctions, resulting in an additional award for fees incurred in connection with Grant's seeking compliance with the first order.

During this time, Jaffe et al. had also failed to timely comply with the court's order directing them to respond to the trustee's interrogatories and request for production. Jaffe et al. did respond four days late, but in an incomplete and evasive manner, refusing to answer certain interrogatories and to produce certain documents. The court entered an order compelling them to produce the documents and answer the interrogatories. Their responses were again non-responsive, evasive and incomplete. Again Grant moved for sanctions, this time asking that Jaffe et al.'s answer to the counterclaim be stricken. No action was taken by the court on the motion at that time.

At the sentencing hearing at his criminal trial, Jaffe indicated that he would voluntarily dismiss the instant action. When the offer was made in this

action, the trustee Grant refused to agree to dismissal unless Jaffe paid the trustee's reasonable costs and attorney fees. With that condition, the district court dismissed the complaint and also dismissed without prejudice the trustee's counterclaim for enforcement of the state court judgment. The trustee moved for reconsideration seeking to have counterclaim reinstated. By order of August 12, 1982, the district court reinstated the trustee's counterclaim noting that jurisdiction over the counterclaim, based on diversity, was independent of jurisdiction over the dismissed complaint. In that same order, the court granted the trustee's renewed motion for sanctions "in light of [plaintiffs'] flagrant and continued failure to comply with discovery requests and Court orders." The court, however, withheld ruling on what the sanction

should be. Jaffe et al. took no action to cure their failure to comply with the court's orders. After a hearing, the district court struck Jaffe et al.'s answers to the trustee's counterclaim and entered judgment by default.

In the Raymond action, which was again before the state trial court, Grant served a request for admission that the corporations had received more than $3 million from contract vendees of Continental. Again, the corporations evaded and Grant moved to strike their answers to the discovery request as a sanction. After a hearing, the state court struck the corporations' responses because of their evasive nature and deemed the request with respect to the $3 figure admitted. On appeal of that ruling, the Florida appellate court affirmed. Ruby Mountin Construction & Development Corp. v. Raymond, 409 So2d

525 (Fla. 5th Dist.Ct.App. 1982). The state trial court then granted the trustee's motion for summary judgment and entered a Supplemental Final Judgment in the amount of $3 plus interest. The corporations appealed but their appeal was dismissed as frivolous, with attorney fees for a bad faith appeal being assessed. Atlantic Commerical Development Corp. v. Raymond, No. 82-724 (Fla. 5th Dist.Ct.App. June 30, 1982). Accordingly, the Supplemental Final Judgment became final and non-appealable.

Grant then moved that the district court enter a damage award against Jaffe et al. jointly and severally in favor of the trustee for $3 million plus interest based on the state court Supplemental Final Judgment. Judgment in this amount was entered on October 2, 1984. Jaffe et al. timely appealed the decision of the district court to this court.

I.

Jurisdiction

As a threshold matter, Jaffe et al. assert that the district court did not have subject matter jurisdiction over the trustee's counterclaim because the parties had purportedly settled the trustee's claim in the bankruptcy proceeding and, in any event, the parties had agreed to have the bankruptcy court resolve any further disputes between them. The district court held that the "settlement" agreement did not deprive it of jurisdiction:

> [Despite] plaintiffs' attempts to characterize the security agreement as constituting a full and complete compromise and settlement of all of the disputes between the parties, the agreement provides on its face that it was to be merely an executory accord until performed by all parties and the parties further agreed that the statute of limitations on defendant GRANT's claim against plaintiffs would be tolled during the period of performance of that agreement. Therefore, defendant GRANT was not barred by the settlement agreement

from asserting, after the plaintiff corporations' breach of that settlement agreement, all claims he had to the fraudulently conveyed property. e.g., Hannah v. James A. Ryder Corp., 380 So.2d 507 (Fla. 3d Dist.Ct.App. 1980).

Plaintiffs also claim the bankruptcy court had the sole jurisdiction to determine the effect of the settlement agreement. The settlement agreement does provide that [corporate plaintiffs] submit to the jurisdiction of the bankruptcy court for purpose of settling their disputes with the trustee arising out of any breach of settlement agreement and any such claim "may" be brought in the bankruptcy court. Nothing in the settlement agreement provided that the bankruptcy court would have exclusive jurisdiction over any disputes arising out of the breach of the settlement agreement and such a determination would be inconsistent with the executory accord language of the settlement agreement. Moreover, the record reflects that after entry of the final default judgment but prior to entry of the supplemental final judgment, plaintiffs filed an action in the bankruptcy court against defendant GRANT, alleging that he breached the settlement agreement. As noted above, that action was dismissed with prejudice for the plaintiff corporations' failure--specifically the failure of Sidney L. Jaffe as president of each of the plaintiff corporations,--to submit to discovery.

Jaffe et al. have not tried to bolster the argument made below and do not address the findings or conclusions of the district court. We are unpersuaded that the district court's analysis of this issue was erroneous, factually or as a matter of law.

[1] Jaffe et al. also contend that the district court had no jurisdiction to "reinstate" the counterclaim because the trustee's counterclaim was never effectively filed. The basis for this argument is that the trustee filed his answer containing the counterclaim "subject to" his earlier filed motion to dismiss. Per Jaffe et al., at the time they withdrew their complaint, Grant had not yet filed his answer so that they had a right to withdraw under Fed.R.Civ.P. 41(a). Under this theory the court had not acquired jurisdiction over the

counterclaim and, thus, could not "reinstate" it.

The trustee states that he filed his answer "subject to" his motion to dismiss merely to avoid waiving that motion by filing his answer; that Jaffe et al answered the counterclaim and never asserted to the district court that the counterclaim had not been filed; and that Rule 41(a)(2) specifically contemplates that a complaint may be dismissed while a counterclaim remains pending.

Under the circumstances, we conclude that the district court did not err in treating the counterclaim as filed. Further, since the trustee's counterclaim had an independent jurisdictional basis, the court had erred in dismissing it. Deauville Corp. v. Garden Suburbs Golf & Country Club, 165 F.2d 431 (5th Cir. 1948); accord Ferguson v. Eakle, 492 F.2d 26 (3d Cir. 1974); 9 C. Wright & A.

Miller, Federal Practice & Procedure, §2365 (1971); 5 J. Moore, Moore's Federal Practice, §41.09 (2d ed. 1985). Thus, the counterclaim was properly reinstated.

II.

Effect of State Court Judgment

The judgment of a state court is entitled to full faith and credit under Article IV, Section 1, United States Constitution and by 28 U.S.C. §1738. Jaffe et al. nevertheless assert that the Raymond Supplemental Final Judgment may be collaterally attacked in these proceedings.

[2] First, Jaffe et al. assert that the state civil judgment was not an "adjudication on the merits" for res judicata purposes because there was no "trial on the merits." As sanctions for discovery abuses, the state court struck responses to the trustee's requests for admissions and deemed the statements

admitted. Jaffe et al. insist that the state court judgment results from the deemed admissions which under Florida R.Civ.P. 1.370(b) and Fed.R.Civ.P. 36(b) have effect only in that litigation. Contrary to Jaffe's analysis, the district court did not give effect to an admission, but rather full faith and credit to a state court judgment, as required by statute and the Constitution.

[3] Next, Jaffe et al. argue that the state court judgment is void because it stemmed from orders that were entered during the time that the state court proceeding was automatically stayed by the bankruptcy proceeding. We agree with the district court that that argument:

> is simply an attempt to extend beyond all rational bounds the legal principle that a judgment entered without subject matter jurisdiction is void and may be subject to collateral attack. The undisputed fact is that the Barbara Raymond court had subject matter jurisdiction on March 10, 1981, when it entered the Final Default

> Judgment and on April 27, 1982, when it entered the Supplemental Final Judgment. Therefore, even if plaintiffs were correct and the Barbara Raymond court erred in relying upon the plaintiffs' failure to comply with the previous orders in entering the Final Default Judgment, that error is not a jurisdictional matter and could only have been corrected, if at all, on direct appeal. See Parker Bros. v. Fagan, 68 F.2d 616, 618 (5th Cir. 1934); Malone v. Meres, [91 Fla. 709], 109 So.677, 684-89 (Fla. 1926).

[4] Jaffe et al. also assert that, because they were held in default, they have been unable to litigate the issue of the jurisdiction of the state court and, thus, they may raise the jurisdictional issue against enforcement of the judgment in this proceeding. Jaffe et al.'s analysis is flawed in that this case involves res judicata in the sense of claim preclusion, not collateral estoppel (or issue preclusion). Thus, contrary to Jaffe et al.'s assertion, the determinative factor here is not whether the issue was litigated, but whether

Jaffe et al. had an opportunity to litigate the matter. AGB Oil Co. v. Crystal Exploration & Production Co., 406 So.2d 1165, 1167-68 (Fla. 3d Dist.Ct.App. 1981). As the district court stated:

> Plaintiffs' contention that the supplemental final judgment is unenforceable because there was no "trial on the merits" is particularly disengenuous in view of the fact that it was the plaintiff corporation's own misconduct in the state court action which prevented any trial on the merits and caused the entry of the $3 million judgment against them.

[5] In any event, a state court judgment must be given the res judicata effect required under that state's governing precedent. Parsons Steel, Inc. v. First Alabama Bank, __ U.S.__, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986). Jaffe has cited no pertinent precedent that would lead to the conclusion that Florida courts would not enforce the subject judgment. On the contrary, in view of the Florida appellate court's

consideration of the proceedings on several occasions, the first affirmance resulting in sanctions for a frivolous appeal, we are wholly unpersuaded that the $3 million judgment is unenforceable in Florida.

[6] Jaffe argues that the state judgment is unenforceable against him personally because he was not formally a party to the state civil case. However, the district court found that Jaffe was in privity with the corporations, indeed their alter ego, and thus, he is as bound by the Supplemental Final Judgment as the corporations.[2] Mendelsund v.

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[2]Jaffe et al. also challenge the district court's purported application of res judicata to the state court criminal judgment which was later reversed-in-part on appeal. Jaffe et al. have made no attempt to show that res judicata was applied below to the state criminal judgment. Rather, the district court accorded res judicata effect to the state civil judgment.

Southern-Aire Coats, 210 So.2d 229 (Fla. 3d Dist.Ct.App. 1968); accord, Dudley v. Smith, 504 F.2d 979, 982-83 (5th Cir. 1974). Jaffe argues that the court's finding flows only from the striking of its answer, not from evidence. Unless the striking was error, and we conclude infra it was not, the finding must stand.

III.

Recusal

Jaffe et al. assert that the district court abused its discretion by denying their motion for Judge Moore to disqualify himself under 28 U.S.C. §455 (1982).[3] Jaffe et al. see prejudice

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[3]Jaffe et al. allege violation of 28 U.S.C. §§455 (a) and (b)(1), which state:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
> (b) He shall also disqualify

(Footnote Continued)

against Jaffe in statements the trial judge made from the bench during a status conference.

The standard for disqualification under §455 has been stated as follows:

> It is well settled that under either Section 144 or Section 455 an allegation of bias sufficient to require disqualification must demonstrate that the bias is personal as distinguished from judicial in nature. The alleged bias and prejudice, in order to be personal and therefore disqualifying, "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). Thus, a motion for recusal may not ordinarily be predicated upon the judge's rulings in the same or a related case. An exception to the general rule that the disqualifying bias must stem from

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(Footnote Continued)

> himself in the following circumstances:
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

> extrajudicial sources is the situation in which "such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." Davis v. Board of School Comm'rs., supra, 517 F.2d [1044] at 1051 [(5th Cir. 1975)].

United States v. Phillips, 664 F.2d 971, 1002-03 (5th Cir., Unit B 1981) (footnotes omitted).

[7] In this case, the court's statements reflect its perception of the underlying facts of this case, Jaffe et al.'s litigation tactics, and their incessant changing of attorneys. The district court's statements were based on knowledge the court had gained in a purely judicial context by presiding over this action and a habeas corpus proceeding filed by the Canadian government.[4] Thus, the statements are

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[4]Factual knowledge gained during earlier participation in judicial

(Footnote Continued)

not a basis for recusal unless they demonstrate pervasive bias and prejudice against Jaffe. We are not persuaded that the instant circumstances are of such an extreme nature that the statements demonstrate pervasive bias and prejudice. The trial court did not abuse its discretion by denying Jaffe's recusal motion.

IV.

Sanctions

[8] Jaffe et al. proffer a laundry list of reasons why the sanctions imposed below are too harsh.[5] Their first

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(Footnote Continued)
proceedings involving the same party is not sufficient to require a judge's recusal. In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 965 (5th Cir.), cert denied sub nom., Mead Corporation v. Adamas Extract, 449 U.S. 888, 101 S.Ct. 244, 66 L.Ed.2d 114 (1980).

[5]The arguments address each factor identified in Marshall v. Segona, 621
(Footnote Continued)

argument, perhaps the nadir of this frivolous collection, is that the deterrent value of the sanction could have been substantially achieved by use of one less drastic. See id. at 768. At oral argument, counsel suggested that an award of costs might have been appropriate. However, such a suggestion flies in the face of the record as well as the facts found by the district court:

> It should be further noted that sanctions in the form of attorneys' fees have twice been imposed on Plaintiffs during the course of this litigation. On January 25, 1982, attorneys' fees were taxed against Plaintiffs for their unjustified failure to attend scheduled depositions. Plaintiffs did not timely pay Defendants the fees

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(Footnote Continued)
F.2d at 768, for determining whether the sanction of dismissal is too harsh for a particular case. The court in Marshall recognized that striking pleadings will sometimes, as here, have the same effect as dismissal. Id. at 766 n.4. Accordingly, it is appropriate to look at those same factors here, where the court's imposition of sanctions resulted in judgment for the trustee.

> imposed by the Court as sanctions and, therefore, further sanctions were imposed against Plaintiffs on February 16, 1982.
>
> It is abundantly clear to the Court that the lesser sanctions contemplated by Rule 37, Fed.R.Civ.P., are not effective in compelling Plaintiffs to conduct discovery in a timely and responsive manner.

[9] Jaffe et al. next argue that imposition of any sanctions was inappropriate because the trustees suffered no prejudice from their failure to respond to the trustee's requests for admissions, relying on Marshall v. Segona, 621 F.2d at 768. Jaffe et al. base their assertion of no prejudice on a statement of the trustee, in his motion to reconsider strking the counterclaim, that "[t]he Counterclaim is presently at issue and ready to be set for pretrial conference and trial." They reason that the trustee could not have been prejudiced by a failure to respond to discovery if he was ready to go to trial.

In making this argument, Jaffe et al. ask us to examine one statement out of context and ignore all the surrounding circumstances. This we refuse to do. At the time the trustee's attorney made that statement, the trustee was vigorously attempting to pry from Jaffe et al. information concerning the amount of funds they had received from Continental's contract vendees. The subject requests for admission remained unanswered when the trial court imposed sanctions. In view of the above circumstances, the assertion that the trustee suffered no prejudice is patently frivolous.

[10] Jaffe et al. seek to place the blame for their longstanding refusal to comply with discovery on one of their former attorneys. See id. They claim that this attorney has possession of the documents sought by Grant. Jaffe et al.

also argue that their failure to comply with the court's orders was due to inability. See id. Purportedly, Jaffe was prevented from complying by his health problems and, later, incarceration at various correctional institutions. However, neither of Jaffe's alleged problems can excuse repeated nonresponsive, evasive and incomplete answers to interrogatories and requests for admissions. For example, Jaffe's alleged problems with his health, incarceration and attorneys cannot excuse the intentional misconduct of producing documents with critical portions torn off.

In Sum, Jaffe et al. have failed to establish that the district court abused its discretion in imposing the sanction of striking their answer to the counterclaim.

V.

The arguments of Jaffe et al. that the proceedings lacked due process, in the main amount to no more than assertions of the above arguments in different garb.[6] Jaffe et al. received not only the minimum process that was due, but also a great deal more.

We AFFIRM the decision of the district court.

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[6]Appellants' argument with respect to the fifth amendment privilege against self-incrimination is obscure and appears to be advanced in support of their due process argument. On this issue, the district court held, inter alia, that any privilege was waived "by plaintiffs' failure to timely assert such privilege in response to defendant GRANT's discovery or even prior to the hearing on all pending discovery motions before the magistrate on September 4, 1984." Appellants assert no error with respect to when the privilege was first raised before the district court. Nor do they argue the court was wrong as a matter of law in holding that the privilege must be timely raised. In any event, we discern no error in the court's ruling. United States v. Kordel, 397 U.S. 1, 10, 90 S.Ct. 763, 768-69, 25 L.Ed2d 1 (1970).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3747

SIDNEY JAFFE, individually, MEADOW VALLEY RANCHOS, INC., etc., et al,

Plaintiffs-Counter-Claim
Defendants-Appellants,

versus

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORP., and as Receiver,

Defendant-Counter-Claim
Plaintiff-Appellee.

Appeal From The United States District Court For the Middle District of Florida

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O R D E R:

The Appellant's Motion to stay the mandate is denied.

The motion of Peter I. Waldmann to withdraw as counsel for Atlantic Commercial Development Corp., Meadow Valley Ranchos, Inc., and Ruby Mountain Construction Corp., is denied.

The motion by attorney Peter Waldmann for extension of time to respond to the motion for attorney's fees is denied.

/S/ PETER T. FAY
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3747

SIDNEY JAFFE, individually, MEADOW VALLEY RANCHOS, INC., etc., et al,

Plaintiffs-Counter-Claim
Defendants-Appellants,

versus

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORP., and as Receiver,

Defendant-Counter-Claim
Plaintiff-Appellee.

MOTION BY COUNSEL PETER I. WADLMANN FOR RECONSIDERATION OF ORDER AGAINST HIM OF OCTOBER 31, 1986 GRANTING APPELLEE'S MOTION FOR ATTORNEY'S FEES AND DOUBLE COSTS AGAINST THE APPELLANTS AND THEIR COUNSEL AND SUGGESTION OF EN BANC CONSIDERATION

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Pro Se

STATEMENT OF THE ISSUES ASSERTED TO MERIT EN BANC CONSIDERATION

The issues asserted to merit en banc consideration are:

-Whether counsel on an appeal, not involved in the proceedings below, or even the filing of the Notice of Appeal, should be sanctioned without evidence of bad faith, misconduct on the appeal, or vexatiousness on his part.

-Whether such sanctions, based on a motion relying on 28 U.S.C. 1927, which expressly limits such sanctions against attorneys to those excess costs reasonably incurred because of attorney's vexatious conduct, or 28 U.S.C. 1912, which is limited to just damages for delay, or Rule 38, F.R.A.P., can or should be made against an attorney jointly and severally with Appellants and co-counsel, particularly where the individual attorney's conduct did not unreasonbly or vexatiously multiply the

proceedings, and that individual attorney's participation cannot have caused any delay.

STATEMENT OF COURSE OF PROCEEDINGS AND DISPOSTION OF THE CASE

1. A timely Notice of Appeal was filed by Attorney James H. Burgess, Jr., on November 1, 1984 from a decision of the United States District Court for the Middle District of Florida, the Honourable Judge John H. Moore, III presiding. The Appeal was from a $3,000,000 default judgment entered after the Appellant's pleadings had been struck as a Rule 37, F.R.C.P. sanction.

2. Attorney Burgess filed a Notice of Withdrawal of Counsel on May 30, 1985. Appellant Jaffe Pro Se filed an Appeal Brief on June 17, 1985.

3. Appellee moved on June 13, 1985 to dismiss the corporate appellants' appeal for failure to timely file their brief.

4. The undersigned counsel, a sole practitioner and barrister of the Law Society of Upper Canada since April 7, 1983, and only admitted to the New York Bar on June 25, 1985, moved for admission to the Bar of the Eleventh Circuit Court of Appeals on July 4, 1985. At the same time, subject to his admission, the undersigned counsel filed a motion on behalf of the corporate appellants in opposition to Appellee's motion to dismiss appeal and to merely adopt for the corporate appellants the Appeal Brief already filed of Jaffe Pro Se.

5. By order of July 23, 1985, the Court granted the corporate appellant's motion to adopt the appeal brief of Jaffe and denied Appellee's Motion to Dismiss.

6. On November 29, 1985, the corporate appellants filed their Reply Brief, and at the same time filed a Motion to Supplement the Record.

Appellee opposed and also brought an Alternative Motion to Supplement the Record on December 13, 1985. Both motions to supplement the record were denied by Order of the Court of January 6, 1986.

7. On January 16, 1986 Appellee moved to strike the corporate appellant's Reply Brief, and the undersigned filed a Response on January 23, 1986 admitting errors but presenting argument against the striking of the Reply Brief. THe Motion to Strike the Reply Brief was denied by the Court by Order dated May 30, 1986.

8. Oral argument was heard on January 29, 1986. Attorney Fletcher N. Baldwin, Jr. filed a notice of appearance on that day and oral argument was made by both Attorney Baldwin and the undersigned counsel.

9. On July 18, 1986, the Court dismissed the appeal with a lengthy opinion dealing with the many arguments raised in the Appeal.

10. Since that decision, a number of steps have been taken by the Appellant Jaffe, and his new counsel. Many of these steps were without any notice to the undersigned counsel. Apparently, Appellant Jaffe brought a Motion for Reconsideration and Suggestion of Rehearing En Banc. The undersigned has never received a copy of this, and only found out when he received a copy of Appellee's response to it of September 11, 1986, and Jaffe's subsequent reply of September 18, 1986, and the Order denying it of Sepember 26, 1986. Also, apparently Jaffe served a motion to stay time to respond to Appellee's Motion to Tax Attorney's Fees, and the undersigned only received notice of it on receiving

the Court's order denying it of September 26, 1986. Further, Jaffe apparently through new counsel being John Cooperman of Kelley, Dry & Warren of New York, served a Motion to Stay Mandate. The undersigned only received notice of this motion by having later received a copy of the Court's order of October 24, 1986, in which it was denied.

11. Appellee served a Motion to Tax Attorney's Fees and Double Costs Against Appellants and Their Counsel on August 26, 1986. The undersigned, who practices in Toronto, Canada, received said Motion on September 3, 1986. The undersigned on September 4, 1986 filed a Notice of Withdrawal as Attorney for the corporate appellants on September 4, 1986, citing that his accounts were unpaid and that he was instructed that his retainer was finished and had been instructed to not communicate with the corporate

appellants. The undersigned also on September 4, 1986 filed a request for an extension of time to respond to Appellee's Motion against him to October 14, 1986, citing that he had only received the motion the day before, was a sole practitioner in Toronto, and that he was leaving the country that same day for an extended period.

12. The undersigned served his Response on October 14, 1986 and it was received by the Court on October 20, 1986.

13. On October 24, 1986, the Court denied the undersigned counsel's Motion to Withdraw as Counsel for the corporate appellants, although it had granted Attorney Baldwin's Motion to Withdraw as Attorney for Jaffe by its Order of September 26, 1986.

14. Also by its Order of October 24, 1986, the Court denied the

undersigned counsel's request for Extension of Time to file a Response to Appellee's Motion to Tax Attorney's Fees and Double Costs as against him.

15. The undersigned filed a Motion for Reconsideration of the Court's Order denying his withdrawal as counsel and also denying his request for an extension of time to respond to Appellee's Motion to Tax Attorney's Fees and Double Costs as against him on October 30, 1986.

16. On October 31, 1986, the Court entered its Order granting Appellee's Motion to Tax Attorney's Fees and Double Costs against appellants and their counsel. A copy of this Order was only received in Toronto by the undersigned counsel on November 13, 1986.

FACTS

1. The undersigned had moved on September 4, 1986 to withdraw as counsel of record for the corporate appellatns on

the basis, inter alia, that he was no longer retained by said corporate appellants.

2. Therefore, although pending reconsideration by the Court the undersigned remains counsel of record for the corporate appellants, he is without instructions from them. Because of this he cannot take any steps on their behalf. Therefore, this Motion is made solely on his own behalf in respect to the Order made against him for attorney's fees and double costs, and is not made on behalf of the corporate appellants.

3. Also on September 4, 1986, the undersigned filed a motion requesting an extension of time to October 14, 1986 to respond to the Appellee's Motion for Attorney's Fees and Double Costs as against him. The basis for that request was that the undersigned, then a sole practitioner in Toronto, was leaving the

country for his vacation the very day following receipt of the appellee's Motion against him, and had to [sic] time to respond. That Motion requested an Extension to October 14, 1986, and the undersigned filed is Response on that date, and was advised by the Court clerk that it had been received on October 20, 1986. However, the Court denied his request for an extension of time to Respond on October 24, 1986. The undersigned also moved on October 30, 1986 to have the Court reconsider its denial of the extension of time but no decision has been received on that request by this date.

4. In light of the extraordinary nature of the Court's order of October 31, 1986, in awarding attorney's fees and costs against counsel on this appeal, and also the time limits specified in Rule 26 of the Rules of the Eleventh Circuit, the

undersigned believes that it is appropriate to make a suggestion for en banc consideration pursuant to Rule 35, F.R.A.P., and Rule 26 of the Rules of the Eleventh Circuit Court of Appeals.

The Appeal Was Not Frivolous

5. Appellee's Motion must be grounded in a finding that the appeal was frivolous. However, examination of the Court's decision of July 18, 1986 does not naturally lead to the conclusion that the appeal was frivolous. First, it is noted that the Court examined at length each of the arguments raised by Appellants at length.

6. Appellee brought numerous motions in the course of the appeal to have the Appeal dismissed: June 13, 1985; July 10, 1985; January 16, 1986 (to strike the Reply Brief). These motions were denied by the Court (by Orders of July 23, 1985 and May 30, 1986). The

undersigned submits that the Court, if it had considered the appeal frivolous, had Rule 18 of the Rules of the Eleventh Circuit available. Instead, the appeal was heard and then dismissed with lengthy reasons.

7. In its decision the Court rejected the various grounds of appeal, and the Appellants lost. However, it is a far leap from the dismissal of the Appeal to a finding that the appeal was so frivolous that the attorneys of record must have pursued it in bad faith.

8. In fact, the underlying nature of this appeal militates strongly against a finding of frivolity. This matter involved a three million dollar default judgment. The default was entered as a sanction for discovery abuses. The choice of the ultimate sanction was a matter for judicial discretion. The complex procedural history of the

District Court litigation, provided various record material which formed the basis for the arguments counsel raised on whether such sanctions were appropriate in this case.

9. These arguments were rejected by the Court which described them as a "laundry list"and a "frivolous collection," and that the due process argument amounted to no more than the same arguments "in different garb" (Op. 4294, 4295, 4296). Other listed submissions such as difficulties due to Jaffe's incarceration, health and problems with inabilities to comply and previous attorneys were mentioned by the Court in its decision, but rejected as not being sufficient to excuse the discovery failings in the District Court (Op. 4295).

10. Although the Court was not persuaded by the arguments on these

factors, that is not to say they were frivolous submissions. Each of these factors are relevant to whether sanctions are appropriate.

11. It is submitted that even if each individual factor was not by itself sufficient, then still counsel could reasonably proceed with the opinion that the Court may be persuaded by a fact situation which presents so many of these factors together. It is further submitted that the situation of the Appellants described in the Record and the Briefs had novel elements and would present a reasonable basis for counsel to suggest a due process argument which is grounded upon the presence of so many of the mitigating factors for sanctions decisions.

The Undersigned Counsel Did Nothing Which Unreasonably and Vexatiously Multiplied the Proceedings.

12. Appellee's Motion for attorneys fees against the undersigned counsel depends upon showing that this Counsel by his own acts unreasonably and vexatiously multiplied the proceedings. He cannot show this, for it is not true.

13. The undersigned counsel did not file the Notice of Appeal, nor was he in any way involved in commencing this appeal.

14. In fact, the undersigned only became a member of the Bar of the State of New York on June 25, 1985, which was after the filing of the Appeal Brief in this case. In his Motion for Attorney's Fees and Double Costs, Appellee acknowledges this, atlhough he puts it in a footnote in such a way as to suggest that becoming a member of the New York Bar was some nefarious activity. (Appellee's Motion, p. 7, fn. 2).

15. Rather than multiply unreasonably the proceedings, the undersigned counsel did not seek to add another Appeal Brief to the Record, but merely brought a motion on July 4, 1985 to adopt for the corporate appellants the Appeal which had been already filed for Jaffe. It is submitted that this approach saved time and expense and was not vexatious. The Court granted this Motion by its Order of July 23, 1985, and therefore apparently concluded it was justified and not unreasonable. Surely this cannot be the basis of Appellee's assertion of bad faith on the undersigned counsel's part, despite his assertions at page 8 of his Motion.

16. Next, Appellee relies on the Motion to Supplement the Record brought by the undersigned counsel on November 29, 1986. This Motion was delivered together with the corporate appellants'

Reply Brief. It was brought in good faith, and it was brought on the basis that certain documents which were not in the Record, but were relevant to the issues in the submission of the corporate appellants, should be before the Court. There was nothing underhanded, or vexatious about bringing such a motion. The undersigned counsel held the opinion that a reasonable argument in the circumstances could be made for that motion, and made it. Appellee brought his own Alternative Motion to Supplement the Record in response on December 10, 1985. The Court reviewed the arguments on both Motions to Supplement the Record, and denied them both in its Order of January 6, 1986.

17. After the denial, the Appellee moved to strike the corporate appellant's Reply Brief on January 16, 1986, and the undersigned counsel responded on July 23,

1986 by admitting that the attacked references in the Reply Brief were in error due to the Order of the Court denying the Motion to Supplement the Record. The Court clearly reviewed both Appellee's Moton to Strike and the undersigned counsel's response by denying the Motion to Strike by its Order of May 30, 1986. Appellee, in his Motion for Attorneys Fees against the undersigned fails to mention that he lost his motion to strike. Surely, if the Court heard both arguments on the Motion to Strike the Reply Brief, and then denied it, then this episode is not evidence of bad faith and vexatiousness on the part of the undersigned counsel.

18. However, from a review of Appellee's Motion to Tax Attorney's Fees, it is clear that the evidence of bad faith which he is relying upon, above and beyond any other, is the oral argument.

He specifically does not make any accusations against the undersigned counsel, but on the assumption that the undersigned is being tarred with the same brush, the following passage is noted at page 10-11:

> 25. After counsel for the Trustee had responded to the arguments asserted by appellants in their briefs and orally trhough attorneys Waldmann and Baldwin, attorney Baldwin made the rebuttal argument on behalf of the appellants. In his rebuttal, attorney Baldwin argued for the first time and without an opportunity for the Trustee's counsel to respond, that the appellants had offered to calculate the total sums collected by them from contract vendees of CSEL if the Trustee would return to them the computer printouts and summaries previously produced by them. Despite the fact that this argument had never been raised in any of the briefs (emphasis added) or in the oral arguments mae [sic] by attorneys Waldmann and Baldwin, attorney Baldwin was sufficiently prepared so as to be able to specifically refer to a page from the transcript of a hearing. (R. 2938, p. 19) where appellant's offer was purportedly made.
>
> 26. Attorney Baldwin's argument was obviously withheld

> until the last minute in a calculated effort to leave the Court with the final impression that the appellants had acted in good faith, the Trustee's motions were technical in nature and he had the means available to him to calculate the sums collected by appellants from contract vendees of CSEL, and the district court had acted unreasonably and abused its discretion in imposing sanctions against appellants.

19. Appellee's quoted argument is completely untrue. This matter was raised, and the reference in the corporate appellants' Reply Brief at pages 22-23, the same Reply Brief which the Court did not strike:

> If a litigant produces the original documents which constitute a list of all amounts collected from all contract vendees, including names and addresses, does he have to do anything more? Is it to be interpreted as wilful, bad-faith non-compliance, justifying the ultimate sanction, simply because the total was not added up? Trustee is perfectly capable of doing the arithmetic himself. Notwithstanding, Appellants offered to calculate the totals by taking the records back already provided and adding them up. (R. 2938, p. 19) (emphasis added)

20. Surely, Appellee's argument flies out the window if there is, as shown above, prior reference in the Briefs to the matter raised in oral argument.

21. All steps taken by the undersigned counsel were taken in good faith, and in respect of his duty as an attorney to represent his clients. By adopting the Jaffe Appeal Brief, rather than seeking to file another Appeal Brief, the undersigned counsel simplified the appeal procedure. The Court approved of this by granting his motion. And, the above shows that contrary to Appellee's assertions, the matter which he states was deliberately raised on rebuttal without warning, in fact had been there in black and white in the corporate appellants' Reply Brief.

22. As the above description shows, the undersigned counsel did nothing in

bad faith, and proceeded in the most expeditious fashion. There is nothing which the undersigned counsel did which vexatiously multiplied the proceedings or which was unreasonable in the appellate adversarial context.

The Conduct of the Undersigned Counsel Cannot, as Against Him, be Linked to Any Continuing Pattern or Practice

23. As the undersigned stated, he is not in a position to respond to Appellee's assertions except as against himself personally. However, it is submitted that if the undersigned couinsel is subject to sanctions, then it must be for his own conduct. There is nothing in the record of this appeal to warrant a finding of either bad faith, misconduct, or attempts to multiply the proceedings vexatiously on his part. He did not commence this Appeal, nor take any dilatory steps on it. Surely, this

Court is not prepared to impose sanctions on counsel for acts other than his own.

ARGUMENTS AND AUTHORITIES

1. When an attorney on appeal is sanctioned, then the decision is of exceptional importance due to the possible chilling effect on litigation in the appellate court. In Limerick v. Greenwald, 749 F.2d 97 (1st Cir. 1984), the court said at 101: "Despite exploding caseloads we have been very reluctant to enter sanctions for frivolous or vexatious appeals because we do not wish to chill the right to appeal."

2. In that case, sanctions were imposed on counsel but upon clear record evidence of bad faith on the part of the acting attorney by findings that the attorney "has continued to engage in practices in direct violation of the applicable rules. . . arguments not relevant in any way . . . filing hundreds

of pages of irrelevant documents. . . bringing repetitive motions without a shred of rational basis. . . counsel for the appellant has not simply filed a frivolous and vexatious appeal but is before this court for the fourth time raising fundamentally the same issues" (at pages 101-102). A fair reading of this case indicates that it is not the frivolousness of the appeal which was the decisive factor, but that the sanctioned attorney was personally responsible for it and 4 prior appearances raising the same matters.

3. The next question of exceptional importance is whether an attorney can be sanctioned with the costs of an appeal without a finding supported in the Record that he acted in bad faith. It is submitted that such a ruling would be in conflict with the binding precedent of Roadway Express Inc. v. Piper, 447 U.S.

752 (1980) which prescribes that a prerequisite to such an Order is a finding of bad faith, not on the part of the appellant, but on the part of the attorney, and with fair notice:

> Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record. But in a proper case, such sanctions are within a court's powers. . . Similarly, the trial court did not make a specific finding as to whether counsel's conduct in this case constituted or was tantamount to bad faith, a finding that would precede any sanction under the court's inherent powers. (at 767).

4. It is submitted that prior authority of this circuit also requires that there be a finding of personal culpability on the part of the attorney. Self v. Self, 614 F.2d 1026 (5th Cir. 1980) was a case where the court found that the appeal was frivolous because it was "beyond pale" that there was not jurisdiction to entertain the appeal. However, the court remanded with these

words: "The district court should hold the attorney for Christine Self personally liable to the extent provided by law if he is found to have been culpable." (at 1028).

5. It is difficult to determine what the Court's Order is based upon since Appellee's Motion was premised upon RUle 38, F.R.A.P., and upon 28 U.S.C. 1912, and upon 28 U.S.C. 1927, and this in itself is a question of exceptional importance since these authorities are different from each other. 28 U.S.C. 1927, which the Self case, supra, turned upon, provides that the sanction against the attorney is limited to "excess costs" and only those excess costs which are caused specifically by that attorney's acts which multiply the proceedings of any case unreasonably and vexatiously: Wood v. Santa Barbara Chamber of Commerce, 699 F.2d 484 (9th Cir. 1983).

6. However, 28 U.S.C. 1912 provides that the court may in its discretion award "just damages for [appellee's] delay, and single or double costs."

7. Rule 38, F.R.A.P., is predicated upon a finding that the appeal is frivolous, and also only directs that the award shall be of "just damages and single or double costs."

8. In this case, the undersigned counsel did nothing which multiplied the proceedings at all unreasonably. If the undersigned counsel would have not filed nothing on behalf of the corporate appellants, and if their appeal would have been summarily dismissed on Appellee's June 13, 1985 motion, it still would not have shortened the proceeding an iota.

9. It is submitted that if it is damages which is being awarded, then Appellee has no damages from the

undersigned's participation, since the notice of appeal was filed by another attorney; the appeal would have proceeded in its course in any event due to Jaffe's Pro Se appeal; and since the undersigned counsel's participation did not in any way cause any delay or excess costs. It is assumed that "excess" means what the word means, that is, costs which are ascribable specifically to unreasonable acts of the undersigned counsel, above and beyond those costs which Appellee would have incurred in defending Jaffe's personal appeal.

10. It is also submitted that it is of exceptional importance to have the above question clarified and answered, for otherwise the Court is effectively punishing the undersigned counsel by association rather than for acts of his own. If this is indeed the effect of this sanctions Order of October 31, 1986, then

the chilling effect is enormous on the legitimate appellate process. Counsel would have to fear accepting appeal briefs on the basis that prior counsel misbehaved, or their client had misbehaved. As stated in United States v. Blodgett, 709 F.2d 608 (9th Cir. 1983):

> Imposition of sanctions under section 1927 requires a finding that counsel acted recklessly or in bad faith. . . . the mere fact that an appeal was frivolous does not of itself establish bad faith. To establish bad faith on this record, a hearing was required to determine if the appeal was taken solely for purposes of delay. . . . Section 1927 only authorizes the taxing of excess costs arising from an attorney's unreasonable and vexatious conduct; it does not authorize imposition of sanctions in excess of costs reasonably incurred because of such conduct.

111. This is particularly cogent because sanctions against the attorney are punitive in nature. Hagerty v. Clement, 749 2d. 217 (1984) states at

222: "Section 1927 should be strictly construed because it is penal in nature."

12. Another question of exceptional importance is clarifying and making uniform the Court's decision on what is the necessary predicate for sanctions on appeal against an attorney. In Duncan v. Poythress, 777 F.2d 1508 (11th Cir. 1985), the Court in obiter makes reference at 1514 to Christianberg Garment Company v. E.E.O.C., 434 U.S. 412 (1978) to support the proposition that a lawyer who brings a frivolous suit may be liable for attorneys fees, even though the Christianberg case is not one which dealt with an award against an attorney, but only dealt with awards in Title VII cases against the client. Christianberg is authority for the proposition that subjective bad faith on the part of the client is not necessary for an award of attorneys fees if the action is

frivolous. It is not relevant to the matter in issue here.

13. This is not to concede in any way that the appeal brought was frivolous. It is submitted that a review of the Briefs, the situation as described in them from the district court proceedings, the arguments raised, although unsuccessful before this Court establish they were not frivolous. A fair reading of the Opinion dismissing the appeal would lead to the same conclusion. Frivolousness requires that it be brought without the slightest chance of success. United States v. Potamkin Cadillac, 697 F.2d 491 (2d Cir. 1983).

14. It is submitted that counsel was not unreasonable in thinking that all of the factors, such as Jaffe's incarceration, health, problems with attorneys, inability to comply, the

timing of the various sanction orders and dismissal orders (dealt with in the Briefs) could possibly have persuaded the Court that the ultimate sanction was too harsh. These are not the type of factors which are easily prejudged as to whether a Court would find them convincing. This is especially so when so many of these factors, for which there is record basis for reasoned argument on criteria defined by the sanctions authorities, are present. If the argument could possibly give plausible support to the appeal, then sanctions, particularly against the attorney, should be denied. Federal Deposit Insurance Corporation v. First State Bank of Abilene, 779 F.2d 242 (5th Cir. 1985).

15. Further, despite the admittedly strong language dismissing the other arguments on appeal, these arguments were not "beyond pale" frivolous. Connell v.

Sears Roebuck & Co., 772 F.2d 1542 (Fed. Cir. 1983) states at 1554:

> The definition of what constitutes a frivolous civil appeal is difficult. Courts must guard against an oversensitivity to what may be only an apparent abuse. It is clear that appeals having a small chance of success are not for that reason alone frivolous. One may legitimately argue, for example, that even overwhelming contrary precedent should be overruled or distinguished.

16. It is submitted that the factors raised in the appeal, including the Bankruptcy jurisdiction, are quite unique and novel particularly in their confluence. The chain of legal steps leading from the state court action and bankruptcy court proceedings and resulting in a $3,000,000.00 default federal court judgment against not only the corporate appellants but also against Jaffe personally, was described in the Briefs. Although it is apparent that the due process argument was rejected vehemently by the court, it is not beyond

plausibility to have argued that the bringing together of all of the factors cited, even though each one by itself may not have been enough, could amount to a due process violation. There is room for an argument that even if each link in a chain is on its own strong, there can come a point where the chain is so long, and pulling such a large load, that it amounts to a denial of due process. Even though the arguments were rejected by the Court, the statement from Fritz v. American Home Shield Corp., 751 F.2d 1152 at 1155 is appropriate:

> Inasmuch as plaintiff's 'alter ego' argument is novel, and defendant's concede that they can cite no court decision contrary to plaintiff's position, we hold that the appeal was made in good faith. . . .

17. All of the authorities which impose sanctions against attorneys for frivolous appeals rely on specific and subjective bad faith on the part of the attorney which is clear from record

evidence. See: Olympia Company v. Celotex Corp., 771 F.2d 888 (5th Cir. 1985); Herzfield & Stern v. Blair, 769 F.2d 645 (10th Cir. 1985); United States v. Potamkin Cadillac, supra; Hagerty v. Clement, supra.

18. In the instant case, Appellee's Motion suggests no basis whatsoever for a finding of bad faith on the part of the undersigned counsel, except for the bringing of a motion to adopt the appeal breif (which the undersigned won), the bringing of a motion to supplement the record (which appellee in response also did, and which both the undersigned and appellee respectively lost), and the defending against appellee's motion to strike the Reply Brief (which the undersigned also won).

19. In fact, a reading of the Appellee's Motion indicates that the principal smoking gun which he alleges is

the reference in oral argument by Attorney Baldwin on rebuttal to the Record. Appellee concocts a scenario of a secret argument held in abeyance until it could be sprung unfairly when Appellee had no chance to reply. This has absolutely no foundation, since the page reference in question was printed in black and white in the corporate appellants' Reply Brief.

20. Outside of the above, it is respectfully submitted that the appeal record is devoid of any evidence of bad faith on the part of the undersigned counsel, and that such a decision sanctioning him should not have been made, and that it especially should not have been made without providing him reasonable opportunity to respond.

CONCLUSION

That this Honourable Court should reconsider En Banc the Court's order of

October 31, 1986, granting appellee's motion to tax attorney's fees and double costs against the undersigned counsel, Peter I. Waldmann, and should deny said motion.

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Peter I. Waldmann

SUPREME COURT OF THE UNITED STATES

No. A-654

SIDNEY JAFFE, ETC., ET AL.,

Applicants,

v.

CHARLES W. GRANT, ETC.,

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 12, 1987.

/s/ Lewis F. Powell, Jr.,
Associate Justice of the Supreme Court of the United States

Dated This 6th day
of March, 1987.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3747

SIDNEY JAFFE, individually, MEADOW VALLEY RANCHOS, INC., etc., et al,

Plaintiffs-Counter-Claim
Defendants-Appellants,

versus

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORP., and as Receiver,

Defendant-Counter-Claim
Plaintiff-Appellee.

NOTICE OF WITHDRAWAL OF COUNSEL

COMES NOW the Counsel of Record for Atlantic Commercial Development Corp. ("ACDC"), Meadow Valley Ranchos, Inc. ("MVR"), and Ruby Mountain Construction Corp. ("RM), collectively referred to as the Appellant Corporations and notifies this Court that he has withdrawn as Counsel for the Appellant Corporations and its services have been terminated in

connection with this proceeding and as reasons therefore states:

1. The accounts of the undersigned counsel have not been fully paid in respect of the work he has done. He has advised Sidney Jaffe that counsel would not continue to act while his accounts were not paid. Sidney Jaffe is the person who undertook personally to pay the accounts and who at all times, as represented to the undersigned counsel, was the only officer and director and agent of the Appellant Corporations from whom counsel could receive instructions with respect to acting in this matter for the Appellant Corporations.

2. Said Sidney Jaffe has instructed the undersigned counsel that all professional relationships with him are terminated. Further, counsel was instructed by Jaffe through another

laywer, John Zeldin, Q.C., to not communicate with him directly.

3. The Appellee has brought a Motion to Tax Attorney's Fees, Double Costs, and Damages Against Appellants And Their Counsel. Since this application is brought not just against the parties to the action, but also against the undersigned counsel, it is the opinion of the undersigned that he cannot in any event continue to act due to having by the bringing of this motion by Appellee become forced to be in the position of a party rather than a lawyer.

_____

Peter I. Waldmann

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3747

SIDNEY JAFFE, et al,

Plaintiffs-Counter-Claim
Defendants-Appellants,

versus

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORP., and as Receiver,

Defendant-Counter-Claim
Plaintiff-Appellee.

APPELLEE'S MOTION TO TAX ATTORNEY'S FEES, DOUBLE COSTS, AND DAMAGES AGAINST APPELLANTS AND THEIR COUNSEL

Pursuant to Rules 38, Fed.R.App.P., and 28 U.S.C. §§1912 and 1927, Appellee Charles W. Grant, Trustee in Bankruptcy for Continental Southeast Land Corp. ("CSEL"), Bankrupt ("Trustee"), moves the Court for entry of an order awarding to the Trustee attorney's fees, double the costs incurred by him in connection with this appeal and damages, and assessing such attorney's fees, costs and damages

against appellant Sidney L. Jaffe ("Jaffe"), Atlantic Commerical Development Corp. ("ACDC"), Meadow Valley Ranchos, Inc. ("MVR"), and Ruby Mountain Construction Corp. ("RM") (sometimes collectively referred to as the "appellant corporations") and their counsel Fletcher N. Baldwin, Jr., Esquire ("attorney Baldwin"), and Peter I. Waldmann, Esquire ("attorney Waldmann"), jointly and severally, and in support of this motion, states:

FACTS

The Appeal Was Frivolous and Totally Without Merit

1. On July 18, 1986, the Court entered its Opinion affirming the decision of the district court entering a judgment for the Trustee against Jaffe and the appellant corporations in the amount of $3 million, plus interest.

2. In the Background portion of its Opinion, the Court found that the

evidence supported in every instance the district court's findings that Jaffe and the appellant corporations had engaged in "flagrant and continued failure to comply with discovery requests and Court orders" (Op. p. 4290) by, their dilatory, incomplete, evasive, and non-responsive responses to the Trustee's discovery requests.

3. It is also apparent from the Court's Opinion that each of the issues raised by appellants was utterly and absolutely meritless for the following reasons, inter alia, stated in the Opinion:

(a) I. Jurisdiction. Appellants "[did not address the findings or conclusions of the district court" rejecting their jurisdictional argument below. (Op. p. 4291).

(b) II. Effect of State Court Judgment. Appellants' argument that the

state court judgment was not entitled to res judicata was "simply an attempt to extend beyond all rational bounds the legal principle that a judgment entered without subject matter jurisdiction is void and may be subject to collateral attack," and "Jaffe has cited no pertinent precedent that would lead to the conclusion that Florida courts would not enforce the subject judgment." (Op. p. 4292).

(c) III. Recusal. The district court properly denied Jaffe's motion for disqualification based upon the court's statements, which merely "reflect[ed] its perception of the underlying facts of the case, Jafee, et al.'s litigation tactics, and their incessant changing of attorneys." (Op. p. 4294).

(d) IV. Sanctions. Appellants' argument that the imposition

of "draconian sanctions"[1] was unwarranted and supported by "a laundry list of reasons" which the Court characterized as a "frivolous collection." The Court also specifically found that: "No basis exists for the argument that less drastic sanctions would have been appropriate." (Op. p. 4294-95). Finally, the Court found that appellants' argument that the Trustee suffered no prejudice from their discovery abuses was "patently frivolous." (Op. p. 4295).

(e) V. Due Process.

Appellants' catch-all argument that they were denied due process was summarily rejected on the grounds that it

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[1]This contention was repeated by attorney Baldwin at oral argument. In fact, attorney Baldwin made no argument in support of the other issues raised by appellants and argued only that the sanctions were too severe and lesser sanctions would have sufficed.

constituted simply a restatement of their earlier arguments. (Op. p. 4296). Alternatively, to the extent appellants' due process argument could be deemed to include the fifth amendment privilege purportedly asserted by appellants below, the district court's holding that the privilege was waived was not challenged on the facts or the law by appellants. (Op. p. 4296, n.6).

Appellants' Counsel is Directly Responsible for Asserting False, Frivolous, and Misleading Arguments and Unreasonably and Vexatiously Multiplying the Proceedings

4. This appeal was initiated by a Notice of Appeal filed by attorney Baldwin and Michael Von Zamft, Esquire ("attorney Von Zamft"), without payment of the filing fee. (R.2930-31; App. 1-2).

5. The initial notice of appeal was followed two days later by another Notice of Appeal filed by James H. Burgess, Jr., Esquire ("attorney Burgess"), with the

filing fee. This notice of appeal identified attorneys Baldwin and Von Zamft as "additional appellate counsel."

6. Thereafter, attorneys Baldwin and Von Zamft made no formal filings with the Court.

7. On April 24, 1985, attorney Burgess served in this appellate proceeding a Motion for Extention of Time for Filing Appellants' Initial Brief seeking an extension through June 1, 1985, for appellants to file their initial brief.

8. Subsequently, on May 30, 1985, attorney Burgess served a Notice of Withdrawal of Counsel. In the notice, attorney Burgess stated that he was initially retained on an emergency basis to file the notice of appeal "because a Notice of Appeal submitted by other Counsel for JAFFE was sent back to that Counsel." (Notice of Withdrawal of

Counsel, ¶1). Attorney Burgess further stated that he was informed by Jaffe that he (attorney Burgess) "would have no responsibility for preparing the Briefs, but that other Counsel more familiar with the lower court proceeding would be involved in preparing the Briefs." Id., ¶3). Because appellants' brief was due June 1, 1985, and attorney Burgess had not been furnished even a copy of the brief to review before it was to be executed by him and filed with the Court, attorney Burgess properly withdrew, stating:

> The undersigned has also been informed by JAFFE that Counsel involved in preparing the brief of Appellant may file a Notice of Appearance in this action. (Id., ¶7) (emphasis added).

Finally, attorney Burgess certified that the "Record on Appeal is being sent to Counsel for Appellees, Terrance E. Schmidt pursuant to the Rules of this Court. (Id., ¶8).

9. On May 31, 1985, Jaffe, purportedly acting pro se, served a Motion for Extension of Time to File Initial Brief on Appeal in which he stated as follows:

> 2. As recited by James Burgess in the notice of withdrawal, he was hired on the last day to file the notice of appeal. The reason for this was that the counsel originally hired to file the notice of appeal had advised on the day previous that his notice of appeal had been rejected because although he was a member of the Bar of the 11th Circuit Court of Appeal, he was not a member of the United States District Court, Middle District of Florida bar.
>
> * * *
>
> 3. The member of the 11th Circuit whose notice of appeal was rejected by the United States District Court, Middle District of Florida, is Professor Fletcher Baldwin. (emphasis added).

Jaffe served a copy of his motion on attorney Baldwin.

10. By letter dated June 4, 1985, addressed to the Clerk of the Court, attorney Burgess confirmed to the Court

and the Trustee's counsel that the record on appeal had been sent to attorney Baldwin in Gainesville, Florida. Attorney Baldwin was shown as a carbon copy addressee of the letter.

11. On June 17, 1985, the initial Brief of Appellants was filed; however, the brief was not signed by Jaffe or by any identified attorney. Rather, the brief was signed by some unknown person who purportedly signed on behalf of Jaffe followed by the words "by [undecipherable initials]." Attorney Baldwin's name did not appear on the brief as counsel of record.

12. On June 20, 1985, purportedly acting pro se, Jaffe executed and served his revised Brief of Appellant on behalf of himself. Again, attorney Baldwin's name did not appear on the brief as counsel of record.

13. On or about June 20, 1985, the record on appeal was received by the Trustee's counsel. The box containing the record was shipped from Gainesville, Florida and contained the return name and address of attorney Baldwin.

14. No brief was served or filed on behalf of the appellant corporations, for whom attorney Burgess had obtained an extention through June 1, 1985, to file their brief pursuant to the Court's order of April 30, 1985. Accordingly, on June 13, 1985, the Trustee filed a Motion to Dismiss Appeal, seeking dismissal of the appellant corporations' appeal for failure to timely file their brief.

15. On July 4, 1985, attorney Waldmann served a Notice of Appearance and Application for Admission pursuant to which attorney Baldwin moved for the admission of attorney Waldmann as counsel

for the appellant corporations in this case.[2]

16. At the same time, he served on behalf of the appellant corporations a Response to Appellee Charles W. Grant, Trustee [sic] Motion to Dismiss and Motion to Incorporate and Adopt Appeal Brief of the Appellant Sidney L. Jaffe[3] in which he specifically adopted that the issues raised and argument presented by

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[2]Attorney Waldmann, a resident of Toronto, Canada, had first become a member of the Bar of the State of New York on June 25, 1985. Prior to that time, he was not eligible for admission to the bar of this Court since he was not a member of the bar of any other state or federal court. See Rule 7, 11th Cir. R., and Rule 46, Fed.R.App.P.

[3]The record does not reflect if or when attorney Waldmann ever even reviewed the record on appeal, despite his filing the appellant corporations' motion to adopt Jaffe's arguments mutatis mutandis (a procedural concept by which the appellate court is presumably left to divine which arguments were intended to apply to Jaffe alone and which were intended to apply to all appellants).

Jaffe in his brief, stating that Jaffe's brief constituted "a fair and correct argument of the issues which apply to the appellant corporations herein" and that the "argument presented in said brief applies equally to the appellant corporations." Attorney Waldmann did not dispute any of the facts stated in the Trustee's motion, but rather argued that the appellant corporations had not had sufficient time to obtain new counsel after attorney Burgess' withdrawal--a dubious assertion in light of the appellant corporations' past practices of "incessantly changing of attorneys." (Op. p. 4294).

17. On July 23, 1985, the Court denied the Trustee's motion to dismiss

and granted the appellant corporations' motion to adopt Jaffe's brief.[4]

18. On November 29, 1985, attorney Waldmann filed a Motion to Supplement the Record by Appellant Corporations in which he sought to supplement the record in this appeal with four documents, none of

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[4] On July 10, 1985, the Trustee had served Appellee's Motion to Dismiss Appeal for Non-Compliance with Appellate Rules. In its order of July 23, 1985, the Court denied the Trustee's motion. However, the appellant corporations never filed any response to the motion, and the motion was well-grounded in fact and necessitated by appellants' indisputable failure to comply with the rules in the manner set forth by the Trustee.

Also, on July 10, 1985, the Trustee had served Appellee's Motion to Dismiss Appeal for Appellant Jaffe's Failure to Appear at Criminal Trial. In its July 23, 1985 order, the Court carried that motion with the case. Although the Trustee subsequently requested in his brief that the Court resolve the appeal on the merits rather than grant the motion to dismiss for Jaffe's failure to appear at his criminal trial, the motion was nevertheless well-grounded in fact and law and was again necessitated by Jaffe's intentional actions of refusing to appear at that trial.

which were part of the record below and all of which were the subject of unauthorized and inappropriate references in the Reply Brief of Corporate Appellants served simultaneously with the Motion to Supplement Record.

19. On December 10, 1985, the Trustee served Appellee's Response and Objection to Motions to Supplement Record by Appellant Corporations in which he pointed out that the motion was "not supported by any case authority" or good cause, and the documents were untimely, unauthenticated, incomplete and submitted in support of misleading and patently frivolous arguments asserted in the motion and the appellant corporations' reply brief.

20. On December 17, 1985, Jaffe, purporting to act pro se, filed his Notice of Adoption of Corporate Appellants' Request to Supplement Record.

Attorney Baldwin was not shown on the notice as counsel of record or otherwise.

21. On January 6, 1986, the Court entered its order denying the Motion to Supplement Record.

22. On January 16, 1986, the Trustee served Appellee's Motion to Strike the Reply Brief of Corporate Appellants on the grounds that their reply brief was replete with references to matters contained in the supplementary appendix which was not part of the record as a result of the Court's order of January 6, 1986, and was otherwise replete with arguments for which there was no support in the record. On January 24, 1986, the Court entered an order carrying the motion to strike with the case.

23. On January 29, 1986, the Court heard oral argument in the case in Miami, Florida. Jaffe did not appear to argue

his appeal pro se. Instead, attorney Baldwin reappeared formally and filed a notice of appearance as counsel for all of the appellants. (App. 3).

24. Attorneys Waldmann and Baldwin both made arguments for appellants. Attorney Waldmann basically recited a factual history of the case and attorney Baldwin argued that the sanctions imposed by the district court were too severe and constituted an abuse of discretion.[5]

25. After counsel for the Trustee had responded to the arguments asserted by appellants in their briefs and orally through attorneys Waldmann and Baldwin,

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[5]The Trustee's counsel believes that the record of the argument will reflect that the suggestion that "an award of costs might have been appropriate" which this Court found "flies in the face of the record as well as the facts found by the district court" (Op. p. 4295) was made by attorney Baldwin. See Rule 24(g), 11th Circuit Rules; Rule V(A)(16), 11th Cir. IOP.

attorney Baldwin made the rebuttal argument on behalf of appellants. In his rebuttal, attorney Baldwin argued for the first time and without an opportunity for the the Trustee's counsel to respond, that the appellants had offered to calculate the total sums collected by them from contract vendees of CSEL if the Trustee would return to them the computer printouts and summaries previously produced by them. Despite the fact that this argument had never been raised in any of the briefs or in the oral arguments made by attorneys Waldmann and Baldwin, attorney Baldwin was insufficiently prepared so as to be able to specifically refer to a page from a transcript of a hearing (R.2938, p. 19) where appellants' offer was purportedly made.

26. Attorney Baldwin's argument was obviously withheld until the last minute

in a calculated effort to leave the Court with the final impression that the appellants had acted in good faith, the Trustee's motions for sanctions were technical in nature and he had the means available to him to calculate the sums collected by appellants from contract vendees of CSEL, and the district court had acted unreasonably and abused its discretion in imposing sanctions against appellants.

27. By letter dated February 6, 1986, attorney Waldmann wrote a letter to the Court on behalf of the appellant corporations "to clarify their submission on this issue to the Court." Attorney Waldmann then repeated the argument made by attorney Baldwin at the conclusion of the oral argument and argued that:

> At no point in the record is there any finding by the District Court that the above answers of the Appellant Corporations are not correct. If the contention is true that the total collected from the

> contract vendees is readily available in the computer printouts in summaries already produced, then certainly there is no prejudice to the Appellee and no basis on this point for a finding of bad faith on the part of the Appellant Corporations.

28. On February 14, 1986, the Trustee served Appellee's Response to Appellants' Letter of February 6, 1986, in which he asserted seven reasons why the arguments made by attorneys Baldwin and Waldmann were "false, misleading, and typical of the bad faith that has permeated [appellants'] actions in this case," not the least of which were the facts that (a) the district court has specifically found in its October 4, 1984, order that the appellants had not furnished all of the documents evidencing the sums they collected from contract vendees of CSEL, (b) the purported offer to which attorneys Baldwin and Waldmann referred specifically dealt with only "computer runs for forty months" even

though Jaffe himself had stated in his sworn Compliance filed on the eve of the entry of the order imposing sanctions that computer printouts had been prepared by appellants for a 60-month period, and (c) the record specifically reflected that no records were produced for the period from May, 1987 to December, 1977 (20 months). Neither appellants nor their counsel sought to reply to Appellee's Response.

29. On July 18, 1986, this Court entered its order affirming in every respect the district court's findings and conclusion.

The Conduct of Appellants and Their Counsel is Part of a Continuing Pattern and Practice

30. Appellants and their former counsel have previously been sanctioned for filing bad faith pleadings, papers and appeals. Attorney's fees and costs have already been assessed against the

corporate appellants and their counsel in two separate instances in the Barbara Raymond state court action. (R.1504-14).

31. Additionally, the record below (part of the Record on Appeal sent to attorney Baldwin) reflects that almost one year to the day prior to this Court's Opinion, the Ninth Circuit Court of Appeals affirmed a decision by the district court of Nevada granting the Trustee a summary judgment in an action filed by MVR seeking to collaterally attack the $3 million judgment entered by the state court in the Barbara Raymond action. The Ninth Circuit found, as did the district court of Nevada, the district court below, and this Court, that MVR was barred by the doctrine of res judicata from re-litigating issues which it either raised or could have raised in the Florida courts, and specifically found:

A review of these actions makes it absolutely clear that MVR's appeal was frivolous and brought only for delay. This court will entertain Grant's timely motion for costs and attorney's fees on appeal. See General Brewing Co. v. Law Firms, etc., 694 F.2d 190, 192-93 (9th Cir. 1982); Fed.R.App.P. 38 (R.2764-65).[6]

32. Finally, it is not insignificant that the district court assessed attorney's fees and costs in the amount of $13,278.75 against appellants--but not their counsel--on November 23, 1982. (R.2123-24). To date, those attorney's fees and costs are unpaid.

MEMORANDUM OF LAW

The Court Has The Power and Authority to Assess Attorney's Fees, Double Costs, and Damages Against Appellants and their Counsel

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[6]Although it is not a part of the record in this case, the Trustee was awarded attorney's fees against MVR but not its counsel.

The Court has the authority and power to award attorney's fees and double costs to the prevailing party in an appeal where the Court determines that the appeal was frivolous or prosecuted for purposes of delay. Rule 38, Fed.R.App.P.; 28 U.S.C. §1912, 1927; United States v. Potamkin Cadillac, 697 F.2d 491, 494-95 (2d Cir. 1983). See also Rule 11, Fed.R.Civ.P. In fact, this COurt has the inherent power to assess attorney's fees and costs against counsel as a means of disciplining such counsel for filing or prosecuting an appeal in bad faith or for dilatory purposes. See Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 65 L.Ed.2d 488, 100 S.Ct. 2485 (1980).

Appellee's research has disclosed numerous cases in which this Court has assessed attorney's fees and costs pursuant to Rule 38, Fed.R.App.P., 28

U.S.C. §1912, and the Court's inherent authority where taxpayers have asserted frivolous contentions on appeal. E.g., Collins v. Amoco Production Co., 706 F.2d 1114 (11th Cir. 1983); Hobson v. Fischbeck, 758 F.2d 579, 581 (11th Cir. 1985); Fortney v. United States, 774 F.2d 445 (11th Cir. 1985); Waters v. C.I.R., 764 F.2d 1389 (11th Cir. 1985); Ricket v. United States, 773 F.2d 1214 (11th Cir. 1985); Motes v. United States, 785 F.2d 928 (11th Cir. 1986).

Appellee's research has disclosed no Eleventh Circuit case authority dealing directly with the issue raised by the pending motion in non-tax cases. In Fritz v. American Home Shield Corp., 752 F.2d 1152 (11th Cir. 1985), the Court declined to assess attorney's fees and double costs against an appellant under Rule 38, Fed.R.App.P., and 28 U.S.C. §1912, stating:

> Inasmuch as plaintiff's "alter ego" argument is novel and defendants concede that they can cite no court decision contrary to plaintiff's position, we hold that the appeal was made in good faith, and reject defendants' suggestion that we assess attorney's fees and double costs against plaintiff. Id. at 1155.

In this case, there was abundant case authority contrary to appellants' position in this appeal (substantially all of which was cited by the Trustee in memoranda to the district court or contained in the district court's opinions) and appellants' arguments were specious rather than novel. Accordingly, Fritz v. American Home Shield Corp., supra, is inapplicable to the facts of this case.

This Court has stated:

> [A] lawyer who brings a frivolous suit may be liable for defendants' attorney's fees under the standard set out by the Supreme Court in Christianberg Garment Company v. E.E.O.C., 434 U.S. 412, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978) ('a district court may in its discretion award attorney's fees to a

> prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith'). See also Fed.R.Civ.P.11 (lawyer, or party if unrepresented, must sign every pleading, motion, or other paper certifying that, to the best of the signer's knowledge, itis well grounded in fact and warranted by law or a good faith argument to change existing law, and is not brought for any improper purpose; papers signed contrary to the rules subjects lawyer, party, or both, to sanctions including paying other party's expenses, attorney's fees); Fed.R.App.P. 38 (if court of appeals determines that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Duncan v. Poythress, 777 F.2d 1508, 1514-15 (11th Cir. 1985)(dicta). Thus, it is apparent that this Court has joined with the United States Supreme Court, and the other Circuit Courts of Appeal, in imposing sanctions against both parties and their attorneys who abuse the judicial process by filing or prosecuting actions or appeals which are frivolous, unreasonable, without foundation, or

meritless, or which are brought in bad faith or for purposes of dealy, harassment, or some other improper purpose. E.g., Christianberg Garment Company v. E.E.O.C., supra; Roadway Express, Inc. v. Piper, supra; Olympia Company, Inc. v. Celotex Corp., 771 F.2d 888, 893 (5th Cir. 1985); Hagerty v. Succession of Clement, 749 F.2d 217, 221-22 (5th Cir. 1984); Bankers Trust Company v. Publicker Industries, Inc., 641 F.2d 1361, 1367-68 (7th Cir. 1981); Herzfeld & Stern v. Blair, 769 F.2d 645, 647 (10th Cir. 1985); Limerick v. Greenwald, 749 F.2d 97, 101-02 (1st Cir. 1984); Hughes v. Hoffman, 750 F.2d 608, 610 (9th Cir. 1983); Woods v. Santa Barbara Chamber of Commerce, 699 F.2d 484, 485-86 (9th Cir. 1983). See also Hartford Textile Corp. v. Shuffman, 613 F.2d 384 (2d Cir. 1979).

This Court correctly found there was no merit in any of the contentions raised by Jaffe in the brief purportedly filed by him pro se but with the undisclosed assistance of attorney Baldwin, who chose to assist Jaffe behind the scenes but would not put his name to the product of his efforts. Attorney Waldmann acted only slightly more responsibly by filing the appellant corporations' briefs adopting after-the-fact the spurious arguments made by or on behalf of Jaffe. Attorney Waldmann then sought to supplement the record in this appeal with documents never made a part of the record below and which, for the reasons stated above, could never have properly been made a part of the record below. Finally, attorneys Baldwin and Waldmann jointly sought to mislead the Court by their last-minute untruthful assertion that the appellants had offered to

calculate the sums of money collected from contract vendees if the Trustee would only return to the appellants the documents they had supposedly previously produced.

If attorneys Baldwin and Waldmann were the first attorneys to have represented Jaffe and his controlled corporations in their efforts to hinder, delay, and harass the Trustee in his efforts to collect the sums fraudulently misappropriated by Jaffe and his corporations from innocent contract vendees of CSEL, there might be some slight excuse for their conduct. In fact, however, they are only the latest attorneys retained by Jaffe to asdvance frivolous arguments on his behalf intended only to delay the Trustee in his collection efforts and vexatiously increase the attorney's fees incurred by the estate in the ultimate hope or

expectation that the Trustee will be financially unable to pursue his collection efforts to completion.

As Chief Judge Markey of the Federal Circuit Court of Appeals stated at the Third Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit:

> It is true that frivolity, as Justice Stewart said about obscenity, is hard to define but we know it when we see it. As a matter of fact, in my view, a frivolous appeal is itself obscene.
>
> You are not without some signposts. I would suggest, for example, that when the question of filing an appeal first arises, consider whether you will have to ignore the authorities cited by the trial tribunal. . . .
>
> If you have to ignore authority relied on by the trial tribunal, an appeal may well be frivolous. If you have to misquote an authority or the trial tribunal, if you have to use an ellipsis. . . in order to escape the thrust of a quote, trying to hide it, maybe you have a frivolous appeal. If you must cite and rely on clear dicta, maybe you have a frivolous appeal. If you find it necessary to attack opposing counsel, maybe you have a frivolous

> appeal. If you are filing it only for a fee, maybe you have a frivolous appeal. If you are filing it only because the client told you to file it, when you know better, maybe you have a frivolous appeal. Those are just a few signposts that occur to me at the moment. . . . There are probably others, but I suspect if all those I mentioned as present you may darn well have a frivolous appeal. Judicial Conference, Federal Circuit, 108 F.R.D. 465, 481 (1985).

As this Court specifically found in its Opinion, appellants ignored the facts and law relied upon by the trial court in entering judgment against them and asserted frivolous and meritless arguments in this appeal. Appellants quoted out of context the statements by the district court which appellants contended evidenced bias or prejudice by the court. Appellants repeatedly sought in their briefs and memoranda to attack the Trustee and his counsel. Their counsel most assuredly has not represented Jaffe and/or his corporations inthis or other actions without payment.

Finally, attorneys Waldmann and Baldwin each either made or adopted the arguments purportedly made by Jaffe acting pro se.

The district court, the Ninth Circuit Court of Appeal, the state and appellate courts in the Barbara Raymond case, and this Court have all seen "frivolity" taken to its ultimate extreme by appellants and their apparently never-ending succession of counsel who appear, assert frivolous and bad faith arguments on behalf of appellants, and then withdraw only to be replaced by new counsel who start the chain again.

For all of the reasons stated above, the Trustee requests that the Court remand the case to the district court with instructions to determine and assess double costs, attorney's fees, and damages against appellants and their counsel, jointly and severally. See, e.g., Hobson v. Fischbeck, supra, at 581;

Waters v. C.I.R., supra, at 1390; Collins v. Amoco Production, supra, at 1115.

BLEDSOE, SCHMIDT & GLENN, P.A.

BY: _____

Terrance E. Schmidt, Esquire
2900 Independence Square
Jacksonville, Florida 32202
(904) 356-2900
Attorneys for Appellee

March 30, 1987

CERTIFIED MAIL
NO. P05 1002256
RETURN RECEIPT REQUESTED

Professor Fletcher N. Baldwin, Jr.
Holland Law Center
University of Florida
Gainesville, Florida 32601

Re: Charles W. Grant, Trustee
v. Sidney L. Jaffe, et al.

Dear Professor Baldwin:

This letter is written solely for the purpose of advising you of an offer by Charles W. Grant, Trustee in Bankruptcy for Continental Southeast Land Corp., Bankrupt ("Trustee"), to compromise the claims he has against you arising out of the Order entered by the Eleventh Circuit Court of Appeals on October 30, 1986, in the case of Sidney L. Jaffe, et al. v. Charles W. Grant, etc., Case No. 84-3747, granting the Trustee's Motion to Tax Attorney's Fees, Double Costs, and Damages Against Appellants and Their Counsel. Accordingly, this letter and your

response, if any, shall not be admissible in evidence in the event we are unable to amicably resolve the claims the Trustee has against you.

As you know, the Eleventh Circuit Court of Appeals' Order of October 30, 1986, is now final with respect to you and subject to appropriate action by the District Court. Before I spend any additional time preparing a motion for entry of a judgment for attorney's fees, damages, and double costs in the District Court, which motion will necessarily include the time expended and costs incurred in connection with that motion and supporting memorandum, I wanted to adivse you as to the amount of time I have already incurred in connection with the appeal and the sums the Trustee has authorized me to advise you he will accept in settlement of his claims

against appellants, attorney Waldmann, and you.

I enclose a summary of the time expended and services performed in connection with the appeal which I am prepared to file in the District Court if we are unable to reach an amicable resolution of the sums due the Trustee. During the pendency of the appeal, my hously rate ranged from $115.00 to $125.00 However, because the attorney's fees represent a liquidated sum for which the Trustee would be entitled to claim interest, I have calculated the attorney's fees on a straight hourly rates basis at $125.00 for me, $80.00 for Harold S. Lippes, Esquire, and $50.00 for Stephen K. Moonly, our associates. On that basis, the total attorney's fees are $23,760.00.

Under the federal "lode-star" method of determining attorney's fees which was recently adopted by the Florida Supreme Court in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985), I believe that a reasonable multiple would be 2.0. However, the Trustee has authorized me to advise you that he is willing to waive any multiple for purposes of trying to achieve a reasonable settlement.

As you acknowledged in your Suggestion for Rehearing En Banc in the Eleventh Circuit, the imposition of "just damages" under Rule 38, F.R.A.P., is a discretionary matter. This is also borne out by the cases which generally award damages based simply on amounts deemed appropriate by the District Court under all of the circumstances of the case or a percentage of the judgment amount. Based

upon the circumstances of this case and the Eleventh Circuit's opinion on the merits and ruling on the motion for attorney's fees, damages and double costs, I would not expect Judge Moore to be miserly in the exercise of his discretion, and we would seek damages in an amount equal to at least the attorney's fees incurred by the Trustee. However, for purposes of settlement, the trustee has authorized me to advise you that he will accept $10,000.00 in satisfaction of his claim for damages.

Finally, pursuant to the Clerk's October 24, 1986, notation on our bill of costs, the Trustee is entitled to $201.60 as double costs.

As I am sure you can understand, the Trustee's collection effort is aimed solely at you at this point because the

Trustee does not desire to incur the additional cost of seeking to collect attorney's fees, damages, and double costs in Canada unless it becomes necessary to do so. Accordingly, the Trustee has authorized me to advise you that he will accept $34,000.00 as settlement in full of all claims he has against you, the appellants and attorney Waldmann in connection with the Eleventh Circuit appeal. In return for each sum, he will release you from all claims arising out of the appeal, and will assign to you his rights under the Court's order of October 30, 1986, so that you can pursue contribution claims against Jaffe and attorney Waldmann, if necessary.

If this offer is not accepted within ten (10) days from the date of this letter, the offer will automatically

terminate and I will immediately prepare and file a motion to recover the full amount of attorney's fees (subject to an appropriate multiple), damages, and double costs awarded to the Trustee by the Eleventh Circuit.

Very truly yours,

Terrance E. Schmidt

TES:sm
enclosure
cc: Professor Fletcher N. Baldwin, Jr.
(BY REGULAR U.S. MAIL)
cc: Charles W. Grant, Trustee

Date	Atty	Time	Descrip
10/30/84	TES	.3	review Notice of Appeal; letter to Trustee; telephone conversation with 11th Cir. Ct. re admission of Baldwin/ Van Zamft;
11/13/84	TES	.2	review Second Notice of Appeal, Notice of Appearance, and Directions to Clerk;
11/26/84	TES	.5	review letter from court reporter; review files re transcripts ordered by plaintiffs and additional transcripts;
12/19/84	TES	.1	review notice from Clerk re record;
02/05/85	TES	.3	review letter from Zeiser; draft Motion to limit Service and Order; letter to Clerk;
02/25/85	TES	.5	
03/08/85	TES	.3	telephone conference with Jim Burgesss;
03/27/85	TES	.8	review notice from Clerk re record and briefing requirements; review F.R.A.P.;
04/24/85	TES	.2	telephone conference

			with Jim Burgess;
04/30/85	TES	.7	legal research re extension to file brief; legal research re grounds for dismissal of appeal;
05/02/85	TES	7.5	additional legal research re grounds for dismissal of appeal;
5/30/85	TES	.3	telephone conference with Jim Burgess;
05/31/85	TES	.2	review Notice of Withdrawal of Counsel;
06/11/85	TES	1.0	review motion for extention, letter from Burgess and memorandum to counsel; draft response to dismiss appeal;
06/12/85	TES	.8	review and revise response; draft motion to dismiss appeal;
06/13/85	HSL	.2	review response and motion;
06/20/85	TES	.1	review Clerk's memorandum;
06/25/85	TES	7.0	review appellant Jaffe's initial brief; legal research re violations of appellate rules and

			11th Circuit rules;
06/26/85	TES	8.0	additional legal research re dismissal of appeal; draft motion to dismiss for non-compliance with rules; draft motion to dismiss for failure to appear at criminal trial;
07/01/85	TES	1.0	draft motions to dismiss;
07/02/85	TES	2.3	review and revise motions to dismiss;
07/03/85	TES	5.5	review and revise motions to dismiss; review files re documents for appendix to motion; prepard appendix;
07/08/85	TES	.2	telephone conference with 11th Circuit Clerk;
07/09/85	TES	4.0	review and revise motions and appendix; draft motion to stay time to file appellee's brief; draft certificate of interested persons;
07/15/85	TES	3.9	review letter from Waldmann, appellant corporations' response to motion to dismiss and motion to adopt Jaffe brief; review telegram

			message to trustee; draft response to motion; draft motion for enlargement of time; review and revise motion; letter to Clerk;
07/16/85	TES	2.2	review motion; review files re withdrawal by Burgess; legal research re dismissal; review and revise response to motion to adopt Jaffe brief;
07/17/85	TES	.2	telephone conference with Waldmann and Jaffe re motion for extension;
07/22/85	TES	1.0	review letter from Waldmann to Clerk and motion for extension;
07/23/85	TES	.2	review request for extension of time to answer motions;
07/24/85	TES	.2	review letter from trustee; review memorandum and orders on pending motions;
09/03/85	TES	.2	telephone conversation with 11th Cir. Clerk
09/06/85	TES	.5	telephone conversation with Jaffe and Waldmann; draft motion for extension of time to file

			brief;
09/16/85	TES	.1	review memorandum and order granting extension;
10/02/85	TES	8.0	review Jaffe's brief and supplemental brief; review corporations' supplemental brief; outline issues raised in Jaffe brief; legal research re issues in appeal;
10/03/85	TES	8.0	legal resarch re issues in appeal; legal research re F.R.A.P. and 11th Cir. R. and O.P. applicable to brief;
10/04/85	TES	8.0	legal research re issues in appeal; outline arguments; review files re chronology of events in district court; draft statement of facts and case in court below; additional legal research;
10/07/85	TES	8.0	draft statement of issues on appeal; draft argument section of brief;
10/08/85	TES	8.0	draft argument section of brief; review and revise statement of facts

			and case and arguments sections; additional legal research and summarize cases; shepardize cases;
10/09/85	TES	7.0	review files re chronology of events in Barbara Raymond action; draft background facts of Barbara Raymond action; review and revise statement of facts and arguments; additional legal research; telephone call to Jaffe; telephone conference with Waldmann; draft motion for extension of time to file brief;
10/10/85	TES	8.0	draft arguments section of brief; review and revise brief; additional legal research; review record on appeal; list exhibits in appendices in record;
10/11/85	TES	8.0	review and revise arguments section of brief; review record on appeal for citations to record in brief and insert references; revise brief to shorten it; complete shepardizing

			cases; draft summary of the argument; draft statement of standard review; draft certificate of interested persons, statement re preference, statement re oral argument;
10/14/85	TES	.5	draft motion for extension; review and revise motion;
10/16/85	TES	11.0	final revisions to brief; check citations; review final brief; deliver brief to printer; mail brief to Court;
11/06/85	TES	.2	telephone conference with Jaffe and Waldmann re extension requests;
11/13/85	TES	.2	review motions for extension;
11/25/85	TES	.1	review memorandum and order;
12/06/85	TES	.4	review motion to supplement record and Clerk's memorandum; draft motion for extension of time to respond;
12/09/85	TES	1.5	review motion to supplement record; outline response; review 11th Cir. Rules;

12/10/85	TES	9.3	legal research re signing of deposition by witness and court reporter; draft response to motion to supplement; review docket; review bankruptcy files and Barbara Raymond files re documents filed with motion; review deposition transcripts filed with motion; review and revise response; prepare alternative motion to supplement record; review and revise motion;
01/06/86	TES	.9	review bankruptcy files re arguments by appellants; review corporate appellants' response and Jaffe's notice of adoption;
01/09/86	TES	.5	review memorandum and order; review briefs;
01/15/86	TES	1.0	review notice from Clerk re oral argument; telephone conference with Clerk; draft motion to rescheduling of oral argument; draft motion to strike brief;
01/27/86	TES	.1	review memorandum and order;
01/28/86	TES	9.1	preparation for oral

			argument before Eleventh Circuit;
01/29/86	TES	7.5	prepare for and attend oral argument in Miami;
02/13/86	TES	6.1	review 2/6/86 letter from Waldmann to Court; review files re issues raised in letter to Court from Peter Waldmann and documents produced by appellants; outline response to appellants' letter of 2/6/86;
02/14/86	TES	5.6	draft response; review additional files; review and revise response;
07/21/86	TES	.5	review 11th Cir. Opinion;
07/31/86	TES	.5	telephone conference with Jaffe;
08/04/86	TES	.5	telephone conference with Fletcher Baldwin; review rules re taxation of costs;
08/5/86	TES	.5	draft motion for enlargement of time;
08/06/86	TES	1.0	legal research re 28 U.S.C. §§1912, 1927, and Rule 28, F.R.A.P.;
08/13/86	TES	2.8	review Jaffe's motion

			for extension of time; legal research re recovery of attorney's fees; draft motion to tax attorney's fees, double costs, and damages; draft motion;
08/14/86	TES	.7	legal research re recovery of attorney's fees;
08/14/86	SKM	1.5	legal research of Rule 38, F.R.A.P.;
08/15/86	SKM	.7	legal research re appeal;
08/17/86	SKM	4.0	legal research re Rule 38, F.R.A.P. and U.S.C. §§1912 and 1927;
08/25/86	TES	1.5	draft inserts to memorandum of law;
08/26/86	TES	5.5	revise motion to tax attorney's fees and costs; review files re references to Baldwin in record; review 11th Cir. cases re award of attorney's fees; telephone conference with Jaffe; final revisions to memorandum of law;
09/09/86	TES	.2	review notice of providing missing document; review

			Waldmann's notice of withdrawal and motion for extension;
09/11/86	TES	1.0	review Jaffe motion for reconsideration and reconsideration en banc and N.Y.L.J. article; draft motion to strike motion for reconsideration; review and revise motion;
09/15/86	TES	.1	review Jaffe's motion to stay time to respond to motion to tax attorney's fees;
09/17/86	TES	1.2	review Baldwin opposition to motion for damages; legal research re liability of attorney who doesn't sign pleadings; draft reply to opposition; review and revise reply;
09/25/86	TES	.4	review Jaffe's response to trustee's motion to strike Jaffe's motion for reconsideration;
10/01/86	TES	.1	review memorandum and order;
10/02/86	TES	.3	review motion to stay mandate; review rules re stay of mandate;
10/17/86	TES	.2	review Waldmann's

			response to motion for attorney's fees;
10/23/86	TES	.6	review second supplement to motion to stay mandate; legal research re bond requirements to stay execution/ mandate; draft response to Jaffe's motion to stay mandate;
10/27/86	TES	.4	review appellants' supplement to motion to stay mandate; review judgment and memorandum;
11/06/86	TES	.4	review memorandum and order awarding attorney's fees, damages, and double costs;
11/18/86	TES	.6	telephone conference Peter Waldmann;
11/19/86	TES	.3	review F.R.A.P. and 11th Cir.R. and O.P. re time for filing a motion for rehearing;
11/20/86	TES	1.0	review Baldwin motion for reconsideration; interoffice conference; review cases cited in motion; review briefs; review docket.
TES	187.6		$23,450.00

HSL	.2	160.00
SKM	6.2	310.00
TOTAL		$23,920.00

No. 86-1637

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PETER I. WALDMANN,

Petitioner,

v.

CHARLES W. GRANT, individually and as Trustee in Bankruptcy for CONTINENTAL SOUTHEAST LAND CORPORATION, and as Receiver,

Respondent.

SUPPLEMENTAL APPENDIX

WILLIAM M. KUNSTLER
13 Gay Street
New York, New York 10014
(212) 924-5661

Attorney for Petitioner
Peter I. Waldmann

EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

SIDNEY L. JAFFE, et al.,

Plaintiffs,

– vs. –

E. L. EASTMOORE, et al.,

Defendants.

ORDER

At the status conference held September 20, 1984, defendant orally requested that the Court reconsider defendant GRANT's motion for final judgment. The Court granted defendant GRANT's request and scheduled a hearing on the motion for final judgment for September 28, 1984. At the hearing the parties appeared through counsel. Having reconsidered the motion, the Court finds that for the reasons stated below, the motion should be granted.

Background

On September 9, 1981, defendant GRANT filed a two-count counterclaim against plaintiffs. On October 14, 1982, the Court entered an Order striking plaintiffs' answer and defenses to defendant GRANT's counterclaim and entered a default against plaintiffs on the liability issues raised by the counterclaim.

At the status conference of September 20, 1984, defendant GRANT voluntarily dismissed Count I of the counterclaim and requested that the Court reconsider the motion for final judgment as to Count II only. Accordingly, the only issue remaining for resolution by the Court is the relief to which defendant Grant is entitled under Count II of the counterclaim.

In Count II of the counterclaim, defendant GRANT seeks to enforce the Final Default Judgment entered March 10, 1981,

by the Circuit Court of Putnam County, Florida, in the Case of *Barbara Raymond, et al. v. Continental Southeast Land Corp., et al.*, Circuit Court in and for Putnam County, Florida, Case No. 78-416, in which the court ordered Atlantic Commercial Development Corporation ("ACDC"), Ruby Mountain Construction & Development Corp. ("RM"), and Meadow Valley Ranchos, Inc. ("MVR") to account for and pay to defendant GRANT all sums collected by those corporations from contract vendees of Continental Southeast Land Corp. ("CSEL") and reserved jurisdiction to award damages in the event such monies were not paid to defendant GRANT. Additionally, defendant GRANT alleged that ACDC, MVR and RM were controlled by Sidney L. Jaffe to the extent that those corporations were simply his alter ego and that the corporations were operated by him as mere instrumentalities for the purpose of perpetrating a fraud upon the creditors of CSEL and defendant GRANT. The relief sought by defendant GRANT in Count II of his counterclaim in this action was the accounting ordered in the Final Default Judgment described above and damages against ACDC, MVR, RM and Sidney L. Jaffe, jointly and severally.

The parties have filed extensive portions of the trial and appellate court records from the *Barbara Raymond* case which evidence the facts described below relating to that case.

After entry of the final default judgment, ACDC, MVR and RM, whose president in each case is Sidney L. Jaffe, refused to account to defendant GRANT pursuant to the final default judgment in the *Barbara Raymond* action and refused to pay to him the sums they collected from the contract venders of CSEL.

Defendant Grant served requests for admissions on ACDC, MVR and RM, in the *Barbara Raymond* action, requesting that they admit they had collected more than $3 million from contract vendees of CSEL. In response to the request, ACDC, MVR, and RM filed dilatory and evasive responses to the requests for admissions. Accordingly, the state court struck their responses to the requests for admissions and deemed the statements admitted. ACDC, RM and MVR appealed that ruling and the Florida Fifth District Court of Appeal affirmed the trial court.

Ruby Mountain Construction & Development Corp. v. Barbara Raymond, 409 So.2d 525 (Fla. 5the DCA 1982).

After the affirmance by the appellate court, defendant GRANT filed a motion before the trial court seeking entry of a judgment of $3 million against ACDC, RM and MVR based upon the admitted statements described above. After due notice to all parties, a hearing was held. ACDC, MVR and RM were represented by counsel at the hearing but presented no evidence in opposition to the motion and did not contest in any way the amount of the judgment. They simply contended that the state court was without jurisdiction. Accordingly, on April 28, 1982, the *Barbara Raymond* court entered the supplemental final judgment for defendant GRANT and against ACDC, MVR and RM, jointly and severally, in the amount of $3 million plus additional sums as accumulated contempt fines and for attorneys fees incurred by defendant GRANT in connection with that action.

ACDC, MVR and RM appealed the supplemental final judgment to the Fifth District Court of Appeal of Florida. That court dismissed the appeal as frivolous and assessed attorneys fees against the appellants and their counsel for having filed and prosecuted the appeal in bad faith. ACDC, MVR, and RM did not seek further review of the order dismissing the appeal, and the supplemental final judgment is now final and non-appealable.

On October 19, 1982, defendant GRANT filed his Motion for Final Judgment in this action in which he contended that under the court's order of October 14, 1982, the supplemental final judgment, and the principles of res judicata and full faith and credit, he was entitled to judgment as a matter of law against ACDC, MVR, RM and Sidney L. Jaffe, jointly and severally, in the amount of $3 million plus accrued interest.

In opposition to defendant GRANT's motion, plaintiffs argued that the supplemental final judgment is not entitled to full faith and credit and has no res judicata effect for three reasons:

(a) The $3 million supplemental final judgment was not an "adjudication on the merits."

(b) Rule 1.370(b), *Florida Rules of Civil Procedures*, and Rule 36(b), *Federal Rules of Civil Procedure*, preclude the court from giving full faith and credit or res judicata effect to the supplemental final judgment because it was based upon admissions which could not be used in any proceeding other than the *Barbara Raymond* action.

(c) The supplemental final judgment was based upon the final default judgment which preceded it and the final default judgment in turn was based upon plaintiffs' refusal to comply with orders they contend were void because the state court supposedly had been deprived of jurisdiction over them by virtue of CSEL's filing a Chapter IX petition in bankruptcy.

Plaintiffs do not assert that there are any issues of disputed fact and all of the issues raised by the motion for final judgment and plaintiffs' response to the motion are issues of law. For the reasons stated below, the issues raised by plaintiffs are insufficient as a matter of law to preclude entry of a final judgment in favor of defendant GRANT.

Order

The Court has personal jurisdiction over the parties hereto, specifically including Sidney L. Jaffe, and jurisdiction over the subject matter of defendant GRANT's counterclaim.

The supplemental final judgment is a final judgment of the State of Florida which has been appealed and upheld by virtue of the appellate court's dismissal of the appeal as frivolous. Accordingly, the judgment is entitled to full faith and credit under Article IV, Section 1, United States Constitution, and 28 U.S.C. § 1738. Additionally, the judgment is entitled to the benefits of the doctrine of res judicata not only against ACDC, MVR, and RM, but also those in privity with them. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 n. 6 (1982); *Dudley v. Smith*, 504 F.2d 979, 982-83 (5th Cir. 1974); *Moyer v. Mathas*, 458 F.2d 431, 434 (5th Cir. 1972). Because Sidney L. Jaffe was found by virtue of the court's October 15, 1982, order to be the alter ego of ACDC, MVR and RM, he was and is in privity with those

corporations for purposes of being bound by the supplemental final judgment under the principles of res judicata. *Dudley v. Smith*, *supra*, at 982-83. *See also*, *Cotton v. Federal Land Bank of Columbia*, 676 F.2d 1368, 1370 (11th Cir. 1982); *Drier v. Tarpin Oil Co.*, 522 F.2d 199, 200 (5th Cir. 1975); *Hyman v. Regenstein*, 258 F.2d 502, 511-12 (5th Cir.) *cert. den.* 359 U.S. 913 (1959).

Plaintiffs' first argument that the supplemental final judgment was not an adjudication on the merits is based solely on their contention that an "adjudication on the merits" requires for res judicata purposes that there be a "trial on the merits." This argument is unsupported by case law, is directly contradicted by all applicable case law and is frivolous. *See*, *Last Chance Milling Co. v. Tyler Mining Co.*, 157 U.S. 683, 691-92 (1895); *Moyer v. Mathas*, *supra*, at 434; *Delray Beach Aviation Corp. v. Mooney Aircraft, Inc.*, 332 F.2d 135 (5th Cir.) *cert. den.* 379 U.S. 915 (1964); *Jackson v. Hayakawa*, 605 F.2d 1121, 1125, n.3 & 4 (9th Cir.) *cert. den.* 445 U.S. 952 (1980); *Mayer v. Distel Tool & Machine Co.*, 556 F.2d 798 (6th Cir. 1977). Plaintiffs' contention that the supplemental final judgment is unenforceable because there was no "trial on the merits" is particularly disingenuous in view of the fact that it was the plaintiff corporations' own misconduct in the state court action which prevented any trial on the merits and caused the entry of the $3 million judgment against them.

Plaintiffs' second argument is equally frivolous. Plaintiffs do not and cannot contend that defendant GRANT has attempted to introduce into evidence in this case the statements deemed admitted in the *Barbara Raymond* case. Defendant GRANT has sought in this case to enforce the Supplemental Final Judgment which was rendered on the merits based upon the *only* evidence before the state court as to the amounts of money collected by ACDC, MVR and RM from the contract vendees of CSEL. That judgment is entitled to full faith and credit and is res judicata for the reasons stated above, and Rule 1.370(b), *Florida Rules of Civil Procedure*, and Rule 36(b), *Federal Rules of Civil Procedure*, have no applicability whatsoever to defendant GRANT's motion for final judgment.

Plaintiffs' third defense to defendant GRANT's pending motion is also without merit. In the first place, the defense as set forth in their memorandum in opposition to motion for final judgment constitutes an attempt by plaintiffs to resurrect the allegations of paragraphs 16, 20 through 30, and 49 of their amended complaint which they asserted as an affirmative defense to defendant GRANT's counterclaim in their Reply to Counterclaim served October 22, 1981. This Court's order of July 14, 1982, granting plaintiffs' motion to dismiss as to defendant GRANT also enjoined plaintiffs from "any further prosecution of the subject matter hereof as to defendant Grant" until the Court determined and plaintiffs paid defendant GRANT's attorneys fees and costs incurred in defending this action. Since plaintiffs have not paid the attorneys fees awarded to defendant GRANT by the Court, they are barred from asserting the subject matter of their complaint as a defense against defendant GRANT's counterclaim. Moreover, the Court's order of October 14, 1982, specifically struck all of plaintiff's defenses including this defense.

Plaintiffs' third defense to defendant GRANT's motion was also raised unsuccessfully by plaintiffs before both the trial court and the appellate court in *Barbara Raymond* in both interlocutory motions and appellate proceedings which were all resolved against plaintiffs. ACEDC, MVR and RM also raised the exact same argument in opposition of defendant GRANT's motion for entry of the $3 million judgment and in the appeal of that judgment which was dismissed by the Florida appellate court as frivolous. ACDC, MVR and RM also made the same argument in an adversary complaint filed against defendant GRANT in the bankruptcy court seeking removal of defendant GRANT as trustee for CSEL. That adversary proceeding was dismissed with prejudice as a result of Sidney L. Jaffe's failure to appear to be deposed pursuant to notice and an order compelling discovery by the bankruptcy court. In their memorandum in opposition to motion for final judgment, plaintiffs contended that "the jurisdictional issue has never been fully litigated." Plaintiffs' memorandum, p.4. For the reasons stated above, that contention is false. Having unsuccessfully asserted this argument before the state trial and appellate courts and the bankruptcy

court, plaintiffs are barred by the doctrine of res judicata from relitigating that issue in this action.

Finally, plaintiffs' contention that the Court should not give full faith and credit and res judicata effect to the supplemental final judgment because it is premised upon the final default judgment which was predicated on the prior order striking the pleadings of and entering a default against ACDC, MVR, and RM for their violation of two previous orders which were purportedly void because the court lacked subject matter jurisdiction to enter the two previous orders is simply an attempt to extend beyond all rational bounds the legal principle that a judgment entered without subject matter jurisdiction is void and may be subject to collateral attack. The undisputed fact is that the *Barbara Raymond* court had subject matter jurisdiction on March 10, 1981, when it entered the Final Default Judgment and on April 27, 1982, when it entered the Supplemental Final Judgment. Therefore, even if plaintiffs were correct and the *Barbara Raymond* court erred in relying upon the plaintiffs' failure to comply with the previous orders in entering the Final Default Judgment, that error is not a jurisdictional matter and could only have been corrected, if at all, on direct appeal. *See Parker Bros. v. Fagan*, 68 F.2d 616, 618 (5th Cir. 1934); *Malone v. Meres*, 109 S. 677, 684-89 (Fla. 1926).

The Court has also reconsidered plaintiffs' motion for partial summary judgment on the issue of damages which can be construed as asserting additional defenses to defendant GRANT's motion for final judgment. Nevertheless, the Court finds that the motion for partial summary judgment was properly denied and raises neither any genuine issues of material fact nor any matters of law sufficient to avoid entry of a final judgment for defendant GRANT.

In the first place, the issues raised by the motion for partial summary judgment constitute affirmative defenses of compromise and settlement and setoff.

The compromise and settlement defense was raised by the factual allegations of the plaintiffs' amended complaint which, as

incorporated into plaintiffs' reply to defendant GRANT's counterclaim, were stricken by the Court's order of October 14, 1982, and plaintiffs cannot resurrect those defenses on the grounds that they are challenging the *amount* of damages to which defendant GRANT is entitled under Count II of the counterclaim. Second, it is apparant from the record that the settlement agreement preceded entry of the final default judgment and the supplemental final judgment in *Barbara Raymond* and, accordingly, could have and should have been raised as defenses in that action if it was to be raised at all. Having failed to raise that defense in the *Barbara Raymond* action, plaintiffs are now barred by the doctrine of res judicata from attempting to assert it as a defense in this action. *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). Finally, despite plaintiffs' attempts to characterize the security agreement as constituting a full and complete compromise and settlement of all of the disputes between the parties, the agreement provides on its face that it was to be merely an executory accord until performed by all parties and the parties further agreed that the statute of limitations on defendant GRANT's claim against plaintiffs would be tolled during the period of performance of that agreement. Therefore, defendant GRANT was not barred by the settlement agreement from asserting, after the plaintiff corporations' breach of that settlement agreement, all claims he had to the fraudulently conveyed property. *E.g.*, *Hannah v. James A. Ryder Corp.*, 380 So.2d 507 (Fla. 3d DCA 1980).

Plaintiffs also claim the bankruptcy court had the sole jurisdiction to determine the effect of the settlement agreement. The settlement agreement does provide that MVR, RM and ACDC submit to the jurisdiction of the bankruptcy court for purpose of settling their disputes with the trustee arising out of any breach of settlement agreement and any such claim "may" be brought in the bankruptcy court. Nothing in the settlement agreement provided that the bankruptcy court would have exclusive jurisdiction over any disputes arising out of the breach of the settlement agreement and such a determination would be inconsistent with the executory accord language of the settlement agreement. Moreover, the record reflects that after entry of the final default

judgment but prior to entry of the supplemental final judgment, plaintiffs filed an action in the bankruptcy court against defendant GRANT, alleging that he breached the settlement agreement. As noted above, that action was dismissed with prejudice for the plaintiff corporations' failure--specifically the failure of Sidney L. Jaffe as president of each of the plaintiff corporations--to submit to discovery.

With respect to plaintiffs' claims that they are entitled to setoff for the value of 40 lots conveyed to defendant Grant under the settlement agreement, an alleged $45,000 paid to defendant GRANT under the settlement agreement, and for some unspecified amount based upon the subordination of the claims of ACDC and MVR in the bankruptcy court, these issues are also a matter of defense which could have and should have been raised in the State court and do not constitute a valid objections to the court's awarding damages based upon the supplemental final judgment. Additionally, these matters were never pled by plaintiffs as defenses to the counterclaim. In any event, even if they had been pled and could be properly considered in determining the damages to which defendant GRANT is entitled under Count II, the record reflects that the property for which plaintiffs claim a setoff is part of the same property which was fraudulently conveyed to plaintiffs in the first place under the fraudulent conveyances voided by the final default judgment. Accordingly, plaintiffs would be entitled to be setoff for the value of that property.

With respect to plaintiffs' claim to a setoff of $45,000, there is no evidence in the record that plaintiffs paid any money to defendant GRANT. However, defendant GRANT concedes in his memorandum that he received the $25,000 down payment under the settlement agreement. The record does reflect that plaintiffs have paid neither the contempt fines described in the supplemental final judgment nor the attorneys fees awarded to defendant GRANT by the court's order of November 11, 1982. Accordingly, to the extent that plaintiffs might be entitled to a setoff claim of $25,000 against defendant GRANT, that setoff does not diminish their liability to defendant GRANT under the supplemental final judgment.

Plaintiffs' claim that the agreement of MVR and ACDC to subordinate their claims in the bankruptcy proceeding and that that subordination had some unspecified value is defeated by the fact that the record reflects that the bankruptcy court disallowed those claims without any objection by ACDC or MVR.

Although the Court has not previously ruled on the motions to continue, abate and stay, filed by Lansing J. Roy, Esquire, on behalf of all plaintiffs, those motions do not require that the court defer ruling on defendant GRANT's motion for final judgment for several reasons. First, the only issue remaining for resolution by the Court is the amount of damages which issue is determined by the sums collected by the plaintiff *corporations*. Those corporations have no Fifth Amendment privilege which would even support let alone require the Court to stay a ruling on defendant GRANT's motion. *Bellis v. United States*, 417 U.S. 85 (1974). Second, any Fifth Amendment privilege which might have been raised by any of the parties has been waived by plaintiffs' failure to timely assert such privilege in response to defendant GRANT's discovery or even prior to the hearing on all pending discovery motions before the magistriate on September 4, 1984. *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981). Third, there has been no showing that plaintiffs would be prejudiced by the Court's ruling on the motion for final judgment which has been exhaustively briefed by the parties and has been pending for almost two years. Only if the motion had been denied would it be necessary for the Court to weigh the claimed prejudice to Sidney L. Jaffe from proceeding to trial of this case against the prejudice to defendant GRANT of staying an action which has now been pending for more than three years. Finally, it is apparent from the motions themselves that the criminal proceedings which Sidney L. Jaffe now contends require the Court to abate or stay this action have been pending since at least July 8, 1983, when the information was filed against him. There has been no explanation as to why Sidney L. Jaffe failed to promptly assert his Fifth Amendment privilege or file the pending motions to abate. *United States v. Kordell*, 397 U.S. 1 (1970).

Finally, the Court feels compelled to comment upon plaintiffs' continued failure even after the default on the liability issue was entered against them to comply with discovery requests initially served by defendant GRANT in October and November, 1981, which have been the subjects of orders compelling plaintiffs to comply with such discovery or to comply with any of defendant GRANT's discovery requests served on plaintiffs since entry of the default. Notwithstanding plaintiffs' claim in the Compliance document that they filed with the Court on the eve of the hearing to determine appropriate sanctions for plaintiffs' discovery abuses, plaintiffs have refused to submit to discovery on the key issues of this litigation and have produced no documents and answered no interrogatories since entry of the October 14, 1982, order. Most importantly, plaintiffs have continued their refusal to answer interrorgatory 25 of defendant GRANT's first set of interrogatories served on each of the plaintiffs on October 21, 1981. In that interrogatory, defendant GRANT requested that plaintiffs state the total amount of money collected by each of the plaintiff corporations from contract vendees of CSEL and the present location of all such sums. Plaintiffs first answered that interrogatory by referring to their response to defendant GRANT's request to produce in which plaintiffs objected to the production of the documents which might have contained the information necessary to answer interrogatory 25. When the Court ordered plaintiffs to answer interrogatory 25, MVR and RM answered the interrogatory by stating they had collected no money from contracted venders and ACDC answered by saying, "See printouts and summaries already produced." When defendant GRANT filed a second renewed motion for sanctions on the grounds, among others, that plaintiffs had still failed to answer interrogatory 25 or produce documents which they had been compelled to produce and after the Court had granted defendant GRANT's motion and scheduled a hearing to determine appropriate sanctions, plaintiffs served additional answers to interrogatories in which they continued to refuse to answer interrogatory 25 and instead contended that RM had delivered to the trustee records from which the total

sum collected by plaintiff could be computed. However, in the Compliance document filed simultaneously with the additional answers to interrogatories, plaintiffs admitted that they had not furnished to defendant GRANT documents for the entire period during thich they had collected monies from contract vendees of CSEL. To this date, plaintiffs have never stated the total dollar amount they collected from contract vendees nor have they accounted to defendant GRANT for any of the proceeds of their collection efforts, and there is absolutely no evidence in the record from which the Court could calculate any amount of damages other than the $3 million amount stated in the supplemental final judgment. If plaintiffs seriously contested the fact that they collected less that $3 million, the obvious method of proving that fact would be to state the amount of money they had, in fact, collected, and produce the documents which would establish that fact. Plaintiffs have done neither and the Court can only conclude that they have never had any intention of either accounting to defendant GRANT as they are obligated to do by the Final Default Judgment and this Court's Order of October 14, 1982, and that they have willfully and intentionally refused to comply with their discovery obligation in this action in an effort to frustrate, hinder and delay the Court from entering a final judgment.

Based upon the facts contained in the record and the issues raised by the parties, defendant GRANT is entitled to a judgment as a matter of law in the amount of $3 million, plus interest from the date of the supplemental final judgment at the rate of 12% per annum pursuant to Section 55.03, *Fla. Stat.* Accordingly, it is

ORDERED AND ADJUDGED:

1. Defendant GRANT's motion for final judgment is GRANTED.

2. The Court will enter a separate judgment pursuant to this Order.

DONE AND ORDERED in Chambers at Jacksonville, Florida this 2 Day of October, 1984.

/S/JOHN H. MOORE II

UNITED STATES DISTRICT JUDGE

Copies to:

All counsel of record